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Nos. 21,607 and 21,607-A

United States Court of Appeals

For the Ninth Circuit

D. Clifford Crummey and
Ethel Elizabeth Crummey,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent.

On Petition to Review Decisions of the Tax Court of the United States

BRIEF FOR PETITIONERS

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OPENING STATEMENT

This is a Petition to Review a determination of the Tax Court of the United States that there is a combined deficiency in gift tax of the Petitioners for the year 1962 in the amount of $990.00 and for the year 1963 of $1,487.72 (R. 83, 89). Jurisdiction was conferred on the Court below under 26 USCA Section 7442. Jurisdiction is conferred on this Court by 26 USCA Sections 7482 and 7483.

The asserted deficiency is based upon the Respondent's erroneous determination that the gifts in trust by the Petitioners were gifts of future interests not qualifying for the annual exclusion pursuant to Sec-

tion 2503 of the 1954 Internal Revenue Code. The case was submitted to the Court below fully stipulated (R. 27-30) and, therefore, this Court can treat this case as a trial *de novo.*

FACTS INVOLVED

The controversy involves the proper determination of the Petitioners' liability for federal gift taxes for the calendar years 1962 and 1963; all of the facts in this case were stipulated (R. 27-30) and in summary the facts are as follows:

On February 12, 1962, Petitioners executed, as Grantors, an Irrevocable Living Trust Agreement for the benefit of their four children, namely, John Knowles Crummey, born February 1, 1940; Janet Sheldon Crummey, born June 21, 1942; David Clarke Crummey, born July 6, 1947; and Mark Clifford Crummey, born February 20, 1951. Petitioners initially contributed $50.00 to the trust and on June 20, 1962, contributed $4,267.77, on December 15, 1962, contributed $49,550.00, and on December 19, 1963, contributed $12,797.81. Each beneficiary had a right to demand at any time (up to and including December 31, of the year in which a transfer to his or her trust had been made), the sum of $4,000.00 or the amount of the transfer from each donor, whichever was less, payable in cash immediately upon receipt by the Trustee of the demand in writing, and, in any event, not later than December 31, in the year in which such transfer was made. Furthermore, the trust provided that if a child was a minor at the time of such gift or

failed in legal capacity for any reason, the child's guardian could have made such demand on behalf of the child, (set out in full at R. 67). This provision, hereinafter referred to as the *demand clause* is set out in full at R. 67.

The Trustee was required to hold the property in equal shares for the children of the Grantors. In addition thereto, the Trustee in his discretion, could distribute the trust income to each beneficiary until the beneficiary attained the age of 21. From age 21 to 35, the Trustee was required to distribute trust income to each beneficiary, and when the beneficiary reached 35, the Trustee was authorized, in his discretion, to distribute trust income to each beneficiary or his issue.

During the years 1962 and 1963, no beneficiary demanded any part of his trust property, nor were distributions made to any of the beneficiaries by the Trustee. Petitioner D. Clifford Crummey had been appointed Guardian of the Person and Estate of his minor children, namely, John K. Crummey, Janet P. Crummey, David C. Crummey, and Mark Clifford Crummey, on December 20, 1951 (R. 94-95).

In filing their federal gift tax returns for 1962 and 1963, Petitioners each claimed a $3,000.00 gift tax exclusion for each of the four trust beneficiaries, constituting a total claimed exclusion by each Petitioner of $24,000.00 for the two years in question. The Commissioner of Internal Revenue held that each Petitioner was entitled to only one $3,000.00 exclusion for 1962 and one $3,000.00 for 1963 (for the shares of the adult beneficiaries), on the ground that gifts in trust

to the minor beneficiaries were "future interests", and therefore disallowed exclusions totalling $18,000.00 for each Petitioner for the two years in question. The Tax Court allowed each Petitioner an additional $3,000.00 exclusion for 1962, and an additional $3,000.00 exclusion for 1963, and determined the deficiencies for the years 1962 and 1963 for the Petitioners, as aforesaid.

QUESTION PRESENTED

1. Do the transfers in trust for the benefit of the minor beneficiaries constitute gifts of present interests qualifying for annual gift tax exclusions under the provisions of Section 2503 of the Internal Revenue Code of 1954?

STATUTES AND REGULATIONS INVOLVED

The parts of the gift tax law (Section 2503(a) and (b), Internal Revenue Code, Title 26 United States Code) and Section 25.2503-3(a) and (b) of the Regulations, which are chiefly involved in this proceeding are copied hereunder for the convenience of the Court.

Internal Revenue Code:

Sec. 2503. Taxable Gifts

(a) General Definition.—The term "taxable gifts" means the total amount of gifts made during the calendar year, less the deductions provided in subchapter C (sec. 2521 and following).

(b) Exclusions From Gifts.—In the case of gifts (other than gifts of future interest in prop-

erty) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

Regulations:

Section 25.2503-3 provides in part as follows:

Section 25.2503-3. Future Interest in Property.

(a) No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, not (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payments in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer used in effecting a gift.

(b) An unrestricted right to the immediate use, possession, or enjoyment of property or the

income from property (such as a life estate or term certain) is a present interest in property. An exclusion is allowable with respect to a gift of such an interest (but not in excess of the value of the interest). If a donee has received a present interest in property, the possibility that such interest may be diminished by the transfer of a greater interest in the same property to the donee through the exercise of a power is disregarded in computing the value of the present interest, to the extent that no part of such interest will at any time pass to any other person (see example (4) of paragraph (c) of this section). For an exception to the rule disallowing an exclusion for gifts of future interests in the case of certain gifts to minors, see 25.2503-4.

POINTS ON WHICH THE PETITIONER RELIES

I. A minor beneficiary of a Trust is permitted under California law to exercise his right under the Trust Agreement to demand partial distribution from the Trustee.

II. In the alternative, under California law, a minor beneficiary over fourteen years of age, has the capacity to exercise his right under the Trust Agreement to demand partial distribution from the Trustee.

III. In the alternative, under California law, a parent as the *natural guardian* of the person of his minor children who are beneficiaries of a Trust, has the right to make demand upon the Trustee for partial distribution of the trust pursuant to the provisions of the Trust Instrument.

IV. The Tax Court erred in denying petitioner's motion for further trial for the purpose of introducing additional evidence to the effect that the petitioner, D. Clifford Crummey, had been appointed Guardian of the Person and Estate of his minor children by a Court of competent jurisdiction.

ARGUMENT

I. A MINOR BENEFICIARY OF A TRUST IS PERMITTED UNDER CALIFORNIA LAW TO EXERCISE HIS RIGHT UNDER THE TRUST AGREEMENT TO DEMAND PARTIAL DISTRIBUTION FROM THE TRUSTEE.

In its opinion (R. 73), the Tax Court correctly held that:

> Paragraph Three of the Trust provides that in the case of a minor beneficiary, his guardian "may" demand the allowable share of an annual gift made to his trust. We interpret the Grantors' use of the word "may" in Paragraph Three as permissive rather than mandatory. Thus, if a minor beneficiary is not prohibited by state law from making his own demand, he has the right under the trust instrument to do so without the assistance of a guardian.

This right is, of course, the critical element which characterizes the gift as a present interest qualifying for the exclusion under Section 2503 (all references herein are to the Internal Revenue Code of 1954 unless otherwise noted). After correctly interpreting the Trustor's intent as set out in the Trust instrument, the Court noted (R. 75) the California statutory pro-

visions which define a minor as one under twenty-one years of age; which establishes a minor's incapacity to appoint an Agent or to sue in his own name; and which establish the relief provision permitting minors to avoid certain contracts, California Civil Code, Sections 25, 33, 35 and 42. From these three isolated and limited statutory distinctions between adults and minors the Court leaps to its gross misinterpretation of the California law (R. 75):

> Accordingly, we hold that David and Mark Crummey themselves, could not have made an effective demand of their trust property during the years in question.

In addition to the three disabilities, not the least in point on the issue in this case, enumerated by the Court, it might have pointed out that a minor may not vote in California, Cal. Const., Art. II, Sec. 1, nor qualify for a driver's license under the age of sixteen years, California Vehicle Code Section 12512. But, how does a review of this type of statutory enactment assist in determining whether or not a minor has the capacity to demand distribution of entirely gifted property? For this we must look elsewhere.

One source is the Tax Court opinion in the present case. In adopting, for the purposes of determining legal capacity to make this demand upon the Trustee, the California distinction between minors under age eighteen and those over that age relating to certain types of contracts, the Court held that a minor over eighteen could make such a demand. To bolster this

holding it cited *Oyama v. California,* 332 U.S. 633 (1948), a case which sustained the right of a six year old child to own real estate acquired by gift from his father. In *Oyama,* the United States Supreme Court rendered unconstitutional the State of California's attempted escheat of the property of an infant American whose father was an alien, ineligible for citizenship. At page 634 Chief Justice Vinson speaking for the Court said:

> The first of the two parcels in question, consisting of six (6) acres of agricultural land in Southern California, was purchased in 1934 when Fred Oyama was six years old.

Page 637:

> The second parcel, an adjoining two (2) acres, was acquired in 1937, when Fred was nine (9) years old.

At page 640 the Court succinctly recapitulates the Federal and California law in this area:

> By Federal statute enacted before the Fourteenth Amendment but vindicated by it, the States must accord to all citizens the right to take and hold real property (citing 8 U.S.C. 42). California, of course, recognizes both this right and the fact that infancy does not incapacitate a minor from holding realty.

The United States Supreme Court cited *Estate of Yano,* 188 Cal. 645, 649, 206 Pac. 995, 998 (1922), and *People v. Fugita,* 215 Cal. 166, 169, 8 P. 2d 1011, 1012 (1932), as its authority for the California law. The Supreme Court has consistently recognized that the Fourteenth Amendment as applied to State action

requires that there be no discrimination against the rights of minors. Since the Tax Court decision in this present case was rendered, the Supreme Court has again spoken, this time in a criminal action. In *Application of Gault,* 87 Supreme Court 1428 (1967), speaking for the majority Justice Fortas noted:

> Accordingly, while these cases (concerning the application of due process to juvenile delinquency proceedings) relate only to the restricted aspects of the subject, *they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.* (Emphasis added.)

It is clear from analysis of the regard of the Court of the rights of a minor, that the Trustee of the Trust here in question could not legally resist the demand of the minor beneficiary for the payment up to the Four Thousand Dollar limit each year. *This is* not to say that the Trustee could not, nor should not insist upon the appointment of a legal guardian to *receive the monies so demanded.* But, the necessity of appointment of a Guardian of the Estate does not preclude the gifting of a present interest. (Revenue Ruling 54-400, Cumulative Bulletin 1954-2 319.) An analysis of the statutory and case authority in California prompts the conclusion that it is the public policy of this state not to curtail the minor in every facet of his activities, but rather to give effect to his actions and decisions limited only by the desire to protect minors by preventing them from handling their own money directly. 26 Cal. Jur. 2d 634, Sec. 6, Infants. The *Oyama, Yano* and *Fugita*

decisions stand for the propositions that in California a minor is a citizen capable of acquiring and disposing of property like other citizens. An infant may receive a gift, and his acceptance thereof is presumed; or as some Courts say when the gift is beneficial the law accepts it for him. *De Lavillin v. Evans,* 39 Cal. 120; *Turner v. Turner,* 173 Cal. 782, 161 Pac. 980.

The California legislature has comprehensively regulated the dealings of minors, but by failing to control many areas, it recognizes the ability of infants to handle the situations themselves. The California Court has said:

> Under the doctrine of *parens patriae* the state, acting through the Legislature, has the inherent power to provide protection to all person *non sui juris,* and to make and enforce such rules and regulations as it deems proper for their management and affairs . . . (There is a) . . . general scheme for regulation of minor's *property rights. Darlington v. Basalt Rock Co.,* 157 Cal. App. 2d 575, 321 P.2d 490.

In the *Yano* case, *supra* the Court discusses the important right of a minor to acquire property:

> She (the alien petitioner's daughter), was a natural born American citizen and as such entitled to acquire and hold property real and personal, her infancy did not incapacitate her from becoming seized from the title of real estate. Delivery to, and acceptance by an infant will be presumed. When a deed clearly beneficial to an infant is given to him, his acceptance will be presumed, and the recording of the deed is a sufficient delivery.

Further:

> The disability of infants are really privileges which the law gives and which they may exercise in their own benefits, the object of the law being to secure infants from damaging themselves or their property by their own improvident act or prevent them from being imposed upon by the fraud of others. 43 C.J.S. 41, Section 19, Infants.

The directions given, or the demands made, by infants upon banks, savings institutions and corporations are given full force and effect as if made by an adult. California Financial Code Sections 850, 853, 7600 and 7606, California Corporations Code Sections 2221 and 2413.[1]

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[1]California Financial Code, Section 850.

Minors. A bank account by or in the name of a minor shall be held for the exclusive right and benefit of such minor and shall be paid to such minor or to his order and payment so made is a valid release and discharge to the bank for such deposit or any part thereof.

California Financial Code, Section 853.

Trust Accounts. Whenever any deposit is made in a bank by any person which in form is in trust for another, but no other or further notice of the existence and terms of a legal and valid trust is given in writing to the bank, in the event of the death of the Trustee, the deposit or any part thereof may be paid to the person for whom the deposit was made, whether or not such person is a minor.

California Financial Code, Section 7600.

Minors. Associations may issue shares or investment certificates to a minor of any age and receive payments thereon by or for such minor. Such minor is entitled to withdraw, transfer, or pledge any shares or certificates owned by him and to receive from the association all dividends, interest, or other money due thereon in the same manner and subject to the same conditions as an adult. The receipt or acquittance of a minor constitutes a valid release and discharge of the association for the payment of dividends, interest, or other money due to such minors.

California Financial Code, Section 7606.

Payments Upon Death of Trustee or Guardian. When a person holding shares or investment certificates as trustee or guardian

Is there any reason to fail to acknowledge an infant's capacity to make a similar demand upon the Trustee of a Trust for his benefit? It appears not; the California rule being that the right to acquire and enjoy property belongs to minors as well as adults, even though the management and control of the estates of minors is subject to guardianship. *Otto v. Union National Bank of Pasadena,* 38 Cal. 2d 233, 226 P. 2d 29, and the second opinion at 238 P. 2d 961.

After citing *Fondren v. Commissioner,* 324 U.S. 18 (1945) which defines a present interest to be the right to presently use, possess or enjoy the property, the Tax Court correctly poses the only issue in this case (R. 72):

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dies and no notice of the terms, revocation, or termination of the trust or guardianship is given in writing to the association, the withdrawal or other value of the shares or investment certificates or any part thereof may be paid to the beneficiary or ward. If no beneficiary or ward has been designated in writing to the association, the withdrawal or other value or any part thereof may be paid to the trustee's or guardian's executor or administrator. Such payment by any association is a valid and sufficient release and discharge of the association for the payment whether or not such payment is made to a minor.
California Corporations Code, Section 2221.

Minor Shareholder; Guardian. Shares standing in the name a minor may be voted and all rights incident thereto may be exercised by his guardian in person or by proxy, or in the absence of such representation by his guardian, by the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the nonage or the appointment of a guardian, and whether or not a guardian has been in fact appointed.
California Corporations Code, Section 2413.

Transfer by Minor or Incompetent; Immunity of Corporation. A domestic corporation or a foreign corporation keeping transfer books in this state is not liable to a minor or incompetent person in whose name shares are of record on its books for transferring the shares on its books at the instance of the minor or incompetent or for the recognition of or dealing with the minor or incompetent as a shareholder, whether or not the corporation had notice, actual or constructive, of the nonage or incompetency.

> . . . In order that the gift in question be held to constitute gift of present interests, and Petitioner's right to the gift tax exclusions sought to be upheld, the evidence must show that the minor beneficiaries during 1962 and 1963, could have effectively demanded whatever trust property they were entitled to at least to the amount of the $3,000 exclusions Petitioners sought to take for such gifts.

Upon analysis, the accurate interpretation of the California law compels an affirmative answer to this question.

II. IN THE ALTERNATIVE, UNDER CALIFORNIA LAW, A MINOR OVER FOURTEEN YEARS OF AGE, HAS THE CAPACITY TO EXERCISE HIS RIGHT UNDER THE TRUST AGREEMENT TO DEMAND PARTIAL DISTRIBUTION FROM THE TRUSTEE.

The public policy of California in recognizing the capacity of a minor fourteen years of age or over to form intelligent decisions in matters of serious consequence is exemplified by the provisions in the California Probate Code which permit the fourteen year old to nominate and to petition the Court for appointment of a guardian.[2]

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[2]California Probate Code, Section 1406.

Guardian of Minor; Rules for Appointment. In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if a child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is *over fourteen years of age,* he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed

The Courts in interpreting these sections (and the predecessor sections in the earlier California code) find no difficulty in recognizing the maturity and capacity of a fourteen year old to make an intelligent selection of the person to serve as his guardian. Language in an important recent case is as follows:

> Where a minor owns property, that fact is ordinarily sufficient to support a finding that the appointment of a guardian of the minor's estate is "necessary or convenient", and the preference of the minor, if fourteen years old, prevails over the obligation of any person, including the parent, provided that the nominee is found to be suitable. *Guardianship of Kentera,* 41 Cal. 2d 639, 643, 262 P. 2d 317 (1953).

In the early definitive case, *Guardianship of Kirkman,* the Court said:

> . . . it is clear that it means that a minor over fourteen years of age has the absolute right to replace the guardian appointed by the court when

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if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court. (Emphasis added.)

California Probate Code, Section 1440.

Authority to Appoint; Petition; Guardianship Over More Than One Minor; Bond. When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, *if fourteen years of age.*

The court may issue letters of guardianship over the person or estate, or both, of more than one minor upon the same application in its discretion. When there is an application for more than one minor, the court may permit a joint or separate bond in such multiple application. (Emphasis added.)

> he was under fourteen years of age, with one of his own selection provided always that the person selected by him is, in the estimation of the court, a suitable or proper person.
>
> The whole statutory scheme contemplates the absolute right of the minor to have a guardian of his own selection after he is fourteen years of age, provided always he selects a person who is, in the judgment of the court, a suitable person to act as guardian. 168 Cal. 688, 144 Pac. 745 (1914).

Again in *Estate of Meiklejohn:*

> . . . the statute gives the minor the authority to select a new guardian, and does not make such power dependent upon the relationship. 171 Cal. 247, 152 Pac. 734.

And in *Estate of McSwain:*

> Becoming over sixteen years of age, the minor, had the right to nominate her guardian, and such nominee, if appointed by the court must be appointed. . . . The minor nominated *Craycroft* to be the Guardian of her person, and her estate, and the court approved the nomination. His appointment as guardian of the estate is therefore imperative. 176 Cal. 287, 168 Pac. 117.

Is not the degree of maturity requisite in the intelligent choice of a guardian of one's entire estate at least as great as that required to determine whether or not to make a demand upon the Trustee for the payment of $4,000 to one's legally appointed guardian? Reason compels an affirmative answer.

III. IN THE ALTERNATIVE, UNDER CALIFORNIA LAW, A PARENT AS THE NATURAL GUARDIAN OF THE PERSON OF HIS MINOR CHILDREN WHO ARE BENEFICIARIES OF A TRUST, HAS THE RIGHT TO MAKE DEMAND UPON THE TRUSTEE FOR PARTIAL DISTRIBUTION OF THE TRUST PURSUANT TO THE PROVISIONS OF THE TRUST INSTRUMENT.

At the outset a distinction must be made between the *legal guardianship* of the estate or property of a minor and the *natural guardianship* prevailing in the relationship of parent and his minor child. The first is a legal status created by a judicial order and issuance of Letters of Guardianship. The second is defined as follows:

> One of the natural rights incident to parenthood, and one supported by law and sound public policy, is the right to *care* and custody of a minor child. This right is frequently referred to as "natural guardianship", "guardianship by nature", or "parental guardianship". 24 Cal. Jur. 2d 248, Section 57, Guardian and Ward.

Analytically, the provision in the *demand clause* referring to demand by a *guardian* includes a *natural guardian;* there was in existence at all times such a *natural guardian* (the beneficiaries' father) during the years in question who could have effectively demanded the trust property; the gift to them is thereby characterized as one of a present interest. Note that the Petitioner's contention is not that the parent-*natural guardian* has a right to manage or control his child's property, but that he, as *natural guardian* has the right and even the duty to make a demand upon the Trustee for distribution pursuant to the *demand*

clause, if in his opinion the child's well being is thereby served. Of course, should the rights and duties incident to this natural guardianship prompt the making of such a demand, then it would be necessary for the Court to issue letters of *legal guardianship* to empower someone to receive the money so demanded. California Probate Code, Section 1400 et seq., *Bogert On Trusts,* Sec. 814. The Tax Court, citing California Civil Code, Section 202, states the California law that a parent has no control over his child's property. (R. 76.) This is true; but as already suggested, the parent as *natural guardian* does have custody and care of his child, and such duty of care might well require the parent to exercise his right under the *demand clause* when, in his opinion the child's well-being is thereby served. The Tax Court both misinterpreted the California law of *natural guardianship,* and confused this relationship with the *legal guardianship,* urging that public policy in California disfavors the appointment of a parent as *legal guardian.* The Tax Court states (R. 77):

> Petitioner's contention is further weakened by California's decisional law which clearly indicates judicial disapproval of the selection of a parent for purposes of managing his child's estate.

To bolster this conclusion the Court below cited *In Re Howard's Guardianship,* 24 P.2d 482. In *Howard,* a totally unrelated 1933 decision of the California Supreme Court, the Court reversed the lower Court's nonsuit of a father's petition for removal of a bank as *legal guardian* of the estate of his minor child. The

Court noted that a guardian must be entirely disinterested and since the bank was also Trustee of a trust, one of the beneficiaries of which was the petitioner's child, it was not disinterested in the fiduciary sense.

Contrary to the interpretation by the Tax Court of the local law in this regard, California specifically favors the parent as guardian of his minor child's person and estate.

> California Probate Code, Section 1407—*Order Of Preference In Appointment.* Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows: (1) to a parent.
>
> . . . . . .

Other California Probate Sections having to do with relatively small estates of minors, disputed claims of minors, compromises or covenants not to sue and the like, demonstrate this legislative preference for appointment of parents as *legal guardian.* California Probate Code, Sections 1430 and 1431.

The cases are consistent with this strong public policy:

> The law is well settled that the parent is entitled to the guardianship of his child in preference to any other person in the absence of the finding of unfitness or incompetency. *Hartman v. Moller,* 99 Cal. App. 57, 277 P. 2d 875 (1929).

As a matter of fact, it has been held that a non-parent seeking to be appointed guardian of a child

has the burden of proving the parent's unfitness. *In Re Clark's Guardianship,* 32 Cal. Rptr. 111, 217 Cal. App. 2d 808 (1963). Cf. *Guardianship of De Brath,* 18 Cal. App. 2d 697, 64 P. 2d 96 (1937), and even in cases where the Court has sustained the appointment of a nonparent it is held that the best interest of a child requires that a parent be his guardian unless the parent is unfit. *In Re Kile's Guardianship,* 89 Cal. App. 2d 445, 200 P. 2d 886 (1949) (wife-killer father), *In Re Smith's Guardianship,* 147 Cal. App. 2d 686, 306 P. 2d 86 (1957) (accused husband-killer mother) and *In Re Newell's Guardianship,* 10 Cal. Rptr. 29, 187 Cal. App. 2d 425 (1961) (fourteen year old unwed mother).

The Tax Court and the Respondent looked beyond the four corners of the Trust instrument and reasoned that even if the parents as natural guardians *could* make the requisite demand, they *would* not do so thereby frustrating their carefully considered plan of gifting. From this it was concluded that the right although it existed in appearance, it did not in fact. It is possible to foresee that the best interest of the child would be served by continuing to leave all of the transferred property in the trust and to draw the income therefrom with the remainder eventually going over to their grandchildren. *But if circumstances changed, as they so often do, between the time of making the trust transfer and the end of the year this conscientious natural guardian could demand at least enough to provide the necessary subsistence for a minor beneficiary.*

Is there necessarily an inconsistency between the "trust provisions (which) indicate a clear intention on the part of petitioners to restrict the use of the trust principal and thereby postpone its enjoyment for the benefit of their grandchildren rather than their children" (R. 78) and the fiduciary duty of petitioners as *natural guardians* to exercise their right pursuant to the *demand clause* if under changed circumstances the children's well-being required it? The law has not hesitated to impose fiduciary standards in such cases. Consider, in the field of corporate law, the shareholder-director, who as director must act for the benefit of the corporation notwithstanding a possible adverse effect on the market value of his shares. He is not, however, precluded from serving on the Board because of his share holdings. Similarly, in the law of trusts, a remainderman may serve as Trustee and is held to the same lofty standards as any trustee. The same is true in the present case. If a demand should have been made for the child's well-being and the parent sought to disregard the child's benefit to carry out his own intended plan, he could be held for a breach of his fiduciary duty. In such a case, those minor beneficiaries over fourteen could, of course, under the Probate Code sections already cited, petition the Court themselves for the appointment of a *legal guardian*. To hold otherwise, is to disregard the traditional equity powers of the Courts as *parens patriae,* and to overlook the entire concept of fiduciary duties. In its opinion, the Tax Court cited *Howard* as requiring that the guardian of an estate should be an entirely disinterested person, free from

temptation or the suspicion thereof. The relevance of this case has already been questioned, but the statement therein that a guardian must be disinterested merely restates this fiduciary duty which, it is submitted, can and must be served to avoid liability. Unlike the situation in *Howard* the trusts in question here have Trustees independent from the Trustors and beneficiaries, and the parent as *natural guardian* must, when acting in that capacity, meet these high fiduciary standards which proscribe self-dealing and any conduct which fails to benefit the minor.

Both the Sixth and Seventh Circuits have analyzed the tax consequences of similar *demand clauses,* and, reversing the Tax Court, have allowed gift tax exclusions ruling that the right to demand by or on behalf of minor beneficiaries created present interests.

In the case of *Kieckhefer v. Commissioner,* 15 T.C. 111, Reversed by CA-7, 189 F. 2d 118, 40 A.F.T.R. 661, the donor created a trust for the benefit of an infant grandson. Paragraph 13 of the trust instrument in *Kieckhefer* provides as follows:

> This trust has been created by the donor after full consideration and advice. Upon such consideration and advice the donor has determined that this said trust shall not contain any right in the donor to alter, amend, revoke or terminate it. The beneficiary shall be entitled to all or any part of the trust estate or to terminate the trust estate in whole or in any part at any time whenever said John Irving Kieckhefer or the legally appointed guardian for his estate shall make due

> demand therefor by instrument in writing filed with the then trustee and upon such demand being received by the trustee the Trustee shall pay said trust estate and its accumulations, or the part thereof for which demand is made, over to the said John Irving Kieckhefer or to the legally appointed guardian for his estate who made such demand on his behalf.

In the *Kieckhefer* case the Commissioner based his argument on the fact that the infant beneficiary was one month old when the trust was created, did not make an effective demand, and, further, that the minor beneficiary had no legally appointed guardian at the time of the execution of the trust. The Tax Court sustained the Commissioner. On Appeal, the Seventh Circuit Court of Appeals reversed the Tax Court and commented upon the fact that the conditions and restrictions upon which the Commissioner relied in his determination that this was a gift of a future interest were not imposed by the trust instrument but resulted solely because of the disability of the beneficiary due to the fact that he was a minor. The Court disagreed with the Commissioner that every gift to a minor is one of a future interest. At 189 F. 2d 121, 40 A.F.T.R. 664, the Court reasoned as follows:

> Suppose in the instant situation that the beneficiary had been an adult rather than a minor. Such adult, of course, could immediately have made a demand upon the Trustee and have received the trust property. We suppose that such a gift unquestionably would be one of a present

> interest. But because the beneficiary is a minor, with the disabilities incident thereto, it is reasoned that the gift is of a future interest because the disabled beneficiary is not capable of making a demand.

The *Kieckhefer* reasoning applies to the case in issue. The Respondent has allowed exclusions for gifts in trust made to an adult offspring apparently for the reason that an adult can effectively make a demand of his share of the gift at any time. However, Respondent disallowed an exclusion for gifts in trust for the benefit of minors on the basis that a minor is incapable of making a demand of his share of a gift in trust.

In the case of *Gilmore v. Commissioner,* 20 T.C. 579, reversed by 213 F. 2d 520, 54-1 U.S.T.C., Para. 10,948, the Petitioner made gifts of corporate stock to trusts created for the benefit of seven minor grandchildren. The trust instrument provided for distribution of the trust estate and the net income therefrom as follows:

> The trustees shall pay the principal and all income from the trust estate to Sherwood M. Boudeman upon demand by the said Sherman M. Boudeman . . .

At the time of the creation of the trusts, each of the minor grandchildren was less than ten years of age. They were all in good physical and mental health and legal guardians were not appointed for them. This Court, in discussing the effect of the above cited *demand clause,* commented as follows at 20 T. C. 583:

> It is true that the first provision for distribution of the trust estate quoted above, taken by itself, would render all gifts those of present interest, for that provision imposes upon the Trustees the duty to transfer the entire corpus and income of the trust to the beneficiaries *upon demand without qualification and independent of any contingency.* (Emphasis supplied.)

This Court's decision, however, was not based on the disability of the beneficiaries but upon other provisions of the trust. At 20 T.C. 583, it stated:

> . . . that later provisions in granting discretionary powers to the trustees have so limited the beneficiaries' rights to distribution upon demand as to render such right a virtual nullity.

The Court thus determined that these provisions limited the beneficiaries' right so as to convert the gifts into those of future interests regardless of whether or not the beneficiaries were minors.

The Sixth Circuit Court of Appeals reversed the Tax Court, holding that the language of the demand clause was sufficient to create gifts of present interest. The Court during the course of its opinion stated:

> . . . And again, we come back to the unqualified directions to the trustees to pay the principal or income of the trusts *on demand of the beneficiary.* Cf. Kieckhefer . . . . It is the right given to the donee, in the trust instrument, to use, possess, or enjoy and not the capacity of the donee, which determines whether the gift is one of present interest or future interest.

In its concluding remarks the Court of Appeals stated as follows:

> The government, however, submits that even though the beneficiaries were adults, the gifts in this case would be contingent to the infant beneficiaries, and that no beneficiary, adult or infant, could make an effective demand that the trustees pay him the entire estate at any time—in spite of the fact that the trust instrument expressly provides for such payment on demand. We are unable to concur in such a view, so obviously contrary to the donor's intention and so clearly contrary to the language of the trust instrument.

A careful examination of the demand clause set forth in the David Clifford Crummey and Ethel Elizabeth Crummey Irrevocable Living Trust Agreement No. 2 reveals that a beneficiary is entitled to demand at any time during the year up to $4,000 of his share of gifts made in trust during the year. In the *Gilmore* case, in which the Court relied on *Kieckhefer* as authority, the trust provided that a demand may be made by a child despite his age. It did not require the appointment of a legal guardian. The trust in the case in issue is similar to that of *Gilmore*. No legal guardian is required by the trust instrument. The trust merely provides that the beneficiary *may demand*.

In the *Gilmore* case, the beneficiaries ranged from seven years to only two months of age in the year in which gifts were made in trust. As the Tax Court stated at 20 T.C. 583, the *demand clause* in *Gilmore*,

taken by itself, would result in the gifts being those of a present interest. It is therefore clear that a similar demand clause in the case in issue results in gifts in trust which are gifts of present interests, for which exclusions are allowable to Petitioners in computing tax due on their 1962 and 1963 Federal gift tax returns.

In a more recent decision, the Tax Court cited both *Gilmore* and *Kieckhefer* and held that a *demand clause* for minor beneficiaries would support gift tax exclusions. See *George W. Perkins,* 27 T.C. 601 (1956). In that case, Petitioners made gifts to trust created for the benefit of minor grandchildren. The beneficiaries, their duly appointed guardians, or their parents were given the right to demand and receive all or part of the trust income or principal. The parents were fully capable of supporting their children. No guardians were appointed except in a few instances. Respondent disallowed the exclusions on the basis that the gifts were those of future interests. The Tax Court held that the Respondent's position might have been tenable if the power to demand income or principal was limited to the beneficiaries *or* duly appointed *legal guardians.* However, the Tax Court held that the adult parents of the beneficiaries (their *natural guardians* under California law) were not incompetent to exercise the power to demand, and since Respondent was unable to show that a demand by the parents could have been properly resisted, the gifts in trusts were of present interests. At page 605 the Court commented as follows:

The parents of the beneficiaries were given the power by clear and unambiguous language to demand and receive on behalf of their respective children all or part of the principal and accumulated income. We cannot see how this power is "vitiated" by the opinion of the settlors that it would be unwise to exercise it under existing conditions or their expectation, however it may be justified by subsequent events, that there would in fact be no such exercise. Respondent has cited no authority, and we know of none, that a demand by the parents could have been properly resisted. The trusts in literal terms created present interests.

We agree with respondent that the circumstances surrounding the creation of the trusts and the making of the gifts are relevant factors, to be considered along with the trust instruments themselves. However, we cannot find from such facts that the gifts were not indeed of present interests. It is admitted that petitioners expected that the power given to the parents of the beneficiaries would not be exercised, at least in the absence of a substantial change of circumstances, and this expectation has apparently proved justified. The parents were and have continued to be financially able to support their children without recourse to trust income or principal. Nonetheless, they have continuously had the right to make such demand since the time the gifts were made. The existence or nonexistence of that right at the relevant time must determine the nature of the gifts, not the subsequent conduct of the parents in choosing whether or not to exercise it. Whatever the motives of the petitioners, their hopes or expecta-

> tions, we cannot hold that the parents of the beneficiaries did not indeed have the right to make demand at any time. They are clearly given such right by the terms of the trust instruments. The surrounding circumstances show only that it was unlikely that they would choose to exercise it, but do not negate its existence.

Finally, the Court summarizes its opinion as follows on page 606:

> In the instant proceeding petitioners decided to and did create trusts for the benefit of their minor grandchildren, and thereafter made gifts of property to those trusts. Neither the trusts nor any of the gifts were unreal or illusory. Petitioners in every relevant transaction did what they purported to do. In so doing, they chose the path of least tax cost. There is nothing improper in so doing, and their actions are no less valid and real than had they chosen instead the path leading to greater tax liability.

In the instant case, Respondent has conceded that gifts to children over twenty-one years of age qualify as gifts of present interest for which exclusions are allowable on the gift tax returns. This concession is inconsistent with Respondent's contention that gifts to minor children are not allowable because made too late in the year and that no notice was given to the beneficiary that he could make a demand for his share of the gift. Respondent has established one standard for adult children and another for minor children. However, there is no evidence that notice of gifts in trust was given to adult children and not given to

minor children. The circumstances parallel those of *Perkins.* Even if it is assumed that donors did not contemplate that a demand would ever be made because of the fact that they were amply able to support their children, the fact is that a demand could have been made, and consequently, the gifts in trust were those of present interests. A minor child in the *Crummey* case *could* have made a demand through his guardian which, in the event of no appointment of a legal guardian, would be his parent *(natural guardian)*, or, for that matter, he could have himself made the demand through the trustee of the trust with respect to claiming his share of the gift made during the year.

IV. THE TAX COURT ERRED IN DENYING PETITIONER'S MOTION FOR FURTHER TRIAL FOR THE PURPOSE OF INTRODUCING ADDITIONAL EVIDENCE TO THE EFFECT THAT THE PETITIONER, D. CLIFFORD CRUMMEY, HAD BEEN APPOINTED GUARDIAN OF THE PERSON AND ESTATE OF HIS MINOR CHILDREN BY A COURT OF COMPETENT JURISDICTION.

If, as the Tax Court concluded, it is required that a *legal guardian* be appointed to exercise the beneficiaries' right under the *demand clause,* the Court erred in denying petitioner's motion for further trial. Subsequent to the entry of the Tax Court's decision, petitioners informed their counsel that petitioner D. Clifford Crummey had been appointed guardian of the person and the estate of his minor children in 1951. (R. 94-95.) Denial of this motion precluded the presentation of evidence of the guardianship appointment, a fact which is material to a correct decision of the case under the rationale adopted by the Tax Court. *Stockyards National Bank of St. Paul,* 153 F. 2d 708, affirmed on other grounds 169 F. 2d 39, *Chatman Phenix National Bank and Trust Company v. Halvering,* 87 F. 2d 547, *Charles A. Polizzi v. Commissioner,* 247 F. 2d 875, *Commissioner v. Wells,* 132 F. 2d 405.

CONCLUSION

It therefore follows that:

(a) Respondent's disallowance of gift-tax exclusions under the provisions of Sec. 2503 of the Internal Revenue Code of 1954 is in error. There existed at all times some one who had the right to make an effective demand upon the trustee for a distribution under the

terms of the trust, such person being the minor beneficiaries themselves; or in the alternative, those over age fourteen, or in the alternative, the parents as natural guardians of the persons of the minor beneficiaries; or in the alternative, the petitioner D. Clifford Crummey as legally appointed guardian of the persons and estate of the minor beneficiaries. The existence of the right to demand characterized the gifts in trust as present interests qualifying for the exclusion.

(b) In the alternative, the Tax Court erred in denying Petitioner's motion for further trial.

Dated, Sacramento, California,
June 15, 1967.

Respectfully submitted,
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Attorneys for Petitioners.

ALVIN R. WOHL,
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Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN B. CINNAMON.

No. 21803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNIFORM OIL COMPANY,
a Montana corporation,

Appellant,

-vs.-

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
W. J. BRIDGES, DONALD W. CULLEN, CURTICE GARDNER and JAMES H. NORWOOD,

Appellees.

BRIEF OF APPELLEE PHILLIPS PETROLEUM COMPANY ON THE MERITS

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Appellee.

BRIEF OF APPELLEE PHILLIPS PETROLEUM COMPANY ON THE MERITS

JURISDICTIONAL STATEMENT

No question is raised by appellee Phillips Petroleum Company as to jurisdiction.

STATEMENT OF THE CASE

This brief will cover separately the issues of Conspiracy, Interstate Commerce and Damages, following the format of appellant's brief. The evidence on each subject and also matters in appellant's Statement which are controverted will be covered in the argument on that subject.

Throughout this brief appellee Phillips Petroleum Company will be referred to as "Phillips" and appellant Uniform Oil Company as "appellant."

SUMMARY OF ARGUMENT

1. *Conspiracy*

The lower court's findings that Phillips had no knowledge of any conspiracy among the individual appellees, if one existed, are correct; no other findings are possible on the record.

Appellant's Statement of the Case on conspiracy is misleading in stating that Phillips had control over appellee Bridges, an independent jobber, either by leases to Bridges or in any other manner. (p. 7) As a jobber Bridges purchased gasoline from Phillips outright and could do with it as he pleased. (p. 7) Bridges could, and did, lower the retail price at his own station without consulting Phillips. (p. 9) Phillips did not have knowledge or notice of any conspiracy, if one existed (p. 15); Phillips did not lower its prices to Bridges as a jobber until almost three months after the action was filed, and then not until several weeks after the other suppliers in Helena had granted competitive price allowances. (p. 13)

None of appellant's cases is in point on the facts and appellant does not argue that any of them is.

2. *Interstate Commerce.*

Before appellant could recover from Phillips, even if a conspiracy to which Phillips was a party had been established, it would have had to prove by a preponderance of the evidence either that the Phillips gasoline sold in Helena was in interstate commerce

or that the conspiracy substantially affected interstate commerce. (p. 27)

The conspiracy charged is price-fixing of Phillips gasoline at the retail stations of the individual appellees *in Helena*, Montana. (p. 27) There is no showing that this gasoline was *in the flow of commerce.* (p. 31) The record is silent as to the place where the gasoline obtained by Bridges, as a jobber, was refined and also as to the place from which it was shipped. (p. 31) Bridges sold some of it at his own retail station *in Helena* and sold and delivered the balance to the other individual appellees, who sold it at their retail stations *in Helena.* (p. 31) The entire activity was intrastate in character. (p. 32)

There is no evidence whatsoever that the alleged conspiracy substantially affected interstate commerce and appellant does not argue that there was any such substantial effect. (p. 35)

3. *Damages.*

The only evidence of the value of Appellant's business is the unsubstantiated testimony of its president that it was worth $60,000.00 as a going business. (p. 35) There was no evidence as to profits, if any, which appellant had made, nor is there any other foundation for the estimate. (p. 36) For that reason the evidence of appellant's president was not properly admissible over objection, which was duly made (p. 40); in any event it has no probative value.

Under the above circumstances the judgment in favor of Phillips should be affirmed on the separate

ground that appellant failed to prove the amount of damages sustained by it, if any.

ARGUMENT

CONSPIRACY

I. Lower Court Correctly Found Phillips Had No Knowledge Of Any Conspiracy

After both parties rested counsel for Phillips made a motion for non suit or directed verdict on the following grounds, among others:

1. Plaintiff had failed to prove that Phillips was a party to any combination or conspiracy whatsoever. (Tr. 175)

2. Plaintiff had failed to prove that Phillips was a party to any conspiracy designed to injure plaintiff. (Tr. 175)

3. Plaintiff had failed to prove that Phillips conspired to monopolize or restrain trade or to eliminate competition in Helena, Montana, or to destroy plaintiff's business or eliminate all "independents" from Helena. (Tr. 175, 176)

The motion was granted. (Tr. 180 and Judgment, R. p. 60)

In the discussion on the motion the court made the following statements:

> "THE COURT: Well it seems to me that with respect to Phillips the plaintiff is in trouble; at least in proving any knowledge on the part of Phillips of any kind of conspiracy going on here." (Tr. 176, 177)
>
> * * * "what evidence is there to show that Phillips had any knowledge of that business, or of those agreements? The only thing that tends

to tie Phillips in is the evidence to the effect that — what is his name, Hamilton?

MR. SKEDD, (Appellant's counsel): Donald Hamilton.

THE COURT: — that Hamilton was at one meeting. And the witness who testified to that said he was at a meeting; that there were no agreements reached; that the price was discussed. Now, this is the substance of the Phillips' knowledge as I see the evidence.

MR. SKEDD: I think — might I say something?

THE COURT: Yes. I want you to answer that.

MR. SKEDD: I think we have a meeting in Spokane.

THE COURT: But you don't get anywhere with that, Mr. Skedd, because he went over to ask — granted he was evasive, and you don't have to believe him, but you can't establish anything by disbelieving a witness; that is, it doesn't supply proof, and all we get out of that is that he asked them if they would help him out and they said no." (Tr. 177, 178)

In response to a reference by Uniform's counsel to the telegram which Bridges sent Phillips (Individual Defendant's Exhibit 1) some three months after suit was filed the Court said:

"THE COURT: As I see it, that doesn't show any more than Phillips was being told that its dealers out here weren't going to be able to survive unless Phillips lowered the price to them. Doesn't tend to prove any knowledge of a conspiracy on Phillips' part. (Tr. 179)

* * *

"THE COURT: * * * I am going to grant the motion as to Phillips on the ground that I sug-

> gest; and so let the record show that the motion of Phillips Petroleum Company for a directed verdict — what do we call this thing a motion for?" (Tr. 180)

Counsel for plaintiff-appellant requested that the court make a finding on this subject, and the court made the following oral finding:

> "THE COURT: Well, the finding that I would make in this respect, and I am not sure about the requirement, is this:
>
> "That as the Court views the evidence there is not sufficient evidence now, if it be assumed that a conspiracy has been proved as to the individual defendants, to indicate that the defendant Phillips Petroleum Company had any knowledge of that conspiracy. The act of Phillips, as the Court views it in granting what has been variously referred to as the subsidy and the competitive price adjustment, in the Court's opinion would not be sufficient to make them guilty of an antitrust violation in the absence of some knowledge that an illegal conspiracy had been created by the individual defendants." (Tr. 181)

The judgment recites that the jury was directed to render its verdict in favor of Phillips. (R. p. 60) We will show that no other decision was possible on the record.

II. Appellant's Statement of Case Is Misleading

Appellant's opening statement on the subject of conspiracy in its brief, so far as it applies to Phillips, is misleading in the extreme. (Br. pp. 6, 7)[3]

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[3] In the opening paragraph of its statement appellant states that it relies in part on the "rejection of Exhibits." (p. 4) None of the rejected exhibits dealt with conspiracy, but in any event appellant abandoned this contention. (Appellant's Br. p. 7)

The first sentence reads:

> "Phillips Petroleum Company had control over the operations of W. J. BRIDGES by use of the lease agreement, (Tr. 63, 64), national advertising, uniform station appearance and National Credit Cards. (Tr. 117, 118, 119)."

Instead of supporting appellant's statement that Phillips had control over the operation of appellee Bridges, the record is absolutely undisputed that Phillips had no control whatsoever over Bridges.

Bridges was a jobber in Helena for Phillips gasoline. (Appellant's brief, pp. 6, 19) He was not a consignee. (Tr. 59) As a jobber, Bridges was an entirely independent business man. He purchased the product outright; he furnished his own plant; he carried his own credit; he owned the product himself and could do with it as he pleased. (Tr. 98, 99) Phillips could not "cancel a jobber out." (Tr. 107) If Bridges chose to give the product away, Phillips could not prevent his doing so.

So far as the leases from Phillips to Bridges are concerned, the record is barren of any evidence as to the provisions of any lease. In accordance with the usual practice, Phillips leased the Phillips stations in Helena to its jobber Bridges; Bridges operated one station himself and subleased the other three retail stations by verbal arrangements to the other individual appellees. (Tr. 64-70) In this situation, as in every other instance, Phillips had no contact with any of these retail dealers except through a district representative,[4] who was completely without knowl-

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[4] The district representative was Don Hamilton. The testimony as to him is analyzed at p. 10 post.

edge or notice of any conspiracy among the dealers, if one existed, and who had no authority with respect to prices.

Appellant next refers to Phillips' control over Bridges by the use of "national advertising, uniform station appearance and National Credit Cards." In support of that statement, appellant refers to pages 117, 118 and 119 of the transcript. That testimony relates entirely to a retail station operated by appellee Gardner under a verbal agreement with Bridges, Phillips' independent jobber. All that it shows is that the station was painted the uniform Phillips red and white. (Tr. 118) On page 120, the witness stated that Phillips had no set rules and regulations.

It must be borne in mind that appellant's brief refers to control over Bridges by the use of these media. Nowhere in the entire record does it appear that Bridges' station was of uniform appearance, or that he used national credit cards, or that he contributed in any manner to Phillips' national advertising.

This is just one of many examples of attempts by appellant to substitute innuendo for proof.

The following sentence on page 6 of appellant's brief reads:

> "During the month of March, 1964, W. J. BRIDGES met in Spokane, Washington with his 'boss' and other management personnel of the Phillips Petroleum Company and discussed gasoline prices. (Tr. 73, 74, 75, 76, 79, 80, and 81)"

Here again appellant seeks to convey or create an impression in the guise of stating a fact. The plac-

ing of the word "boss" in quotation marks suggests a connotation flatly refuted by the record.

Taking up the transcript pages referred to by appellant in support of this statement seriatim, Bridges went to Spokane to negotiate a loan from Phillips about the middle of March, 1964 (pp. 73, 74); he discussed with the engineering and maintenance department the question of erecting a pilon sign at his own retail station (75), and went in to see the division manager "mainly to get lunch." (pp. 75, 76) On page 75, he referred to the division manager as "boss" and immediately explained that he meant the division manager. On page 77, he stated flatly that he was mistaken when he referred to the division manager as the "boss." His testimony on pages 75, 76, and 77 completely annihilates any inference that the division manager was Bridges' boss in the sense that he could control Bridges' operations.

The division manager and Bridges discussed gaining more volume in Helena and a new advertising program which was being initiated (page 76); Bridges told the division manager he was planning to lower prices (Tr. 79) at his own retail station in Helena only. (Tr. 96) Asked if the division manager forbid him to lower his price, he answered, "He couldn't very well", (Tr. 79) and added on page 80, "He sure didn't tell me to do it either."

Bridges asked a marketing assistant of Phillips in Spokane if he could get any assistance and his request was refused. (Tr. 80, 81)

The inference intended to be created by the state-

ment that Bridges and management "personnel in Spokane discussed gasoline prices" (Br. p. 6) is destroyed by the very evidence to which appellant refers in support of it.

That evidence shows that all that was said about gasoline prices was Bridges' assertion that he was going to lower retail prices at his own station and that Phillips could do nothing about it; that the other individual appellees were not present; and that Phillips flatly refused to give Bridges any assistance.

The next sentence on page 6 of the brief reads:

> "W. J. BRIDGES also in the month of March, 1964, met with the 'Operators', DONALD W. CULLEN, JAMES H. NORWOOD, and CURTICE GARDNER, and one DON HAMILTON, representative of Phillips Petroleum Cobpany, and discussed lowering of gasoline prices, the matter of the 'Independents' operation and the lowering of the prices of gasoline to 33.9 cents per gallon. (Tr. 132, 158, and 159)."

This statement is repeated almost verbatim at page 20, with the same reference to the transcript.[5]

This brings us back to Don Hamilton.

Don Hamilton

There is no question that Hamilton was a district representative of Phillips in Montana (Tr. 77), but there is not one word in the record which even suggests that Hamilton had any knowledge or notice of, or that he participated in, any conspiracy, or that he had any authority with respect to prices.

The only witness who testified that Hamilton was

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[5]These are the only references to Hamilton in the appellant's brief.

present at any meeting with the individual appellees was appellee Norwood, a retail station operator.

Called as a witness by appellant's counsel Norwood testified:

"Q. Mr. Norwood, do you recall the month of March, 1964, when the price of gasoline was lowered in the City of Helena?

A. I recall when it was lowered. I wouldn't say as to what month, day or year.

Q. Did you attend a meeting in the Steamboat Block?

A. No, sir.

Q. Didn't? Did you attend any meeting with James Bridges and the other Phillips 66 dealers at 1901 North Main Street[6] in Helena in the month of March?

A. I attended a meeting. As I say, I don't recall dates.

Q. Was Mr. Don Hamilton at that meeting?

A. Yes.

Q. And he is the Phillips 66 representative, is he not?

A. Yes.

Q. And at that meeting was the price of gasoline discussed?

A. Yes.

Q. And the lowering of the gasoline prices.

A. Not necessarily.

Q. Well, at all?

A. Mr. Bridges might have informed us that he would lower the prices.

Q. Was there a discussion as to what would happen if gasoline prices were lowered?

A. No."

(Tr. p. 158, line 11 to p. 159, line 11)

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[6] This is the station that was operated by appellee Bridges.

The only discussion of "lowering of gasoline prices" at the meeting was the statement by Bridges, already made to Phillips in Spokane, that he was going to lower prices at his own retail station.

There was no discussion of "the matter of the 'Independent's' operation and the lowering of prices of gasoline to 33.9 cents per gallon."

The testimony on page 132 of the transcript is taken from that of appellee Gardner, a retail station operator. Nowhere in his entire testimony does he mention Don Hamilton. He did not fix the date of the meeting at 1901 North Main Street about which he testified other than to say it was prior to the lowering of prices in March, 1964. (Tr. 131, 132) Pages 158 and 159 relate to the testimony of appellee Norwood, set forth above; Norwood did not fix the date of the meeting about which he testified.

In other words, the record shows no connection between the meeting about which Gardner testified and the meeting to which Norwood referred.

This is yet another instance of appellant's persistent effort to substitute surmise for proof.

The first full paragraph on page 7 of the brief at first glance implies that Phillips had some connection with placing at the various retail stations signs "commonly used for gas wars." The brief does not so state, and reference to the transcript citations in the brief clearly demonstrates why no such statement could be made.

The brief next states on page 7 that the reduced prices continued into the fall of 1964. There is no

evidence whatsoever as to when the "gas war" ended.

In the second paragraph on page 7, appellant states that Phillips "paid a subsidy which insured the 'Operators' a five cents a gallon profit, regardless of how low the price descended. (Tr. 169, 92, 93)."

Here again the inference is that Phillips granted such a subsidy to the lessees of the retail stations. The testimony positively refutes this inference.

On page 93 Bridges stated that other companies were granting their dealers a competitive price allowance; Phillips took no action on the price to its jobber, Bridges, until June 23, 1964, almost three months after the "gas war" started.

On June 23, 1964, Bridges sent a telegram to Phillips at Bartlesville, Oklahoma (Tr. 95), stating that he and the other retail dealers were facing financial ruin because of inability to compete in the local gasoline market, and that the other major oil companies and other suppliers had, since June 1, 1964, been subsidizing their jobbers. The telegram requested immediate assistance. (Individual defendant's Exhibit No. 1)[7]

Then, and then only, some twelve weeks after the law suit was commenced, did Phillips grant a competitive price allowance *to Bridges* of five cents a gallon. (Tr. 92) The record does not show the exact date the allowance was granted by Phillips, but obviously it was several weeks after the other suppliers had granted allowances on June 1. By June 23 Bridges had to have an allowance or close up his plant.

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[7] This exhibit is set forth in full at Appendix, page 1.

Under these circumstances, Phillips gave Bridges the competitive price allowance.

We re-emphasize that Phillips did not grant any allowance to Gardner, Norwood or Cullen.

The above was the only allowance which Phillips granted. Appellant's statement that Phillips 66 "paid a subsidy which insured the 'Operators' a five cents a gallon profit, regardless of how low the price dropped" is utterly without support in the record; it contradicts the record, and it is so absurd on its face that no further comment is necessary.

The only other discussion of the "facts" as to conspiracy is found on page 19 of appellant's brief. Appellant concedes that Bridges was a jobber, not a consignee; that Phillips leased all four gas stations to Bridges, who sub-leased the Gardner, Norwood and Cullen stations to them under a verbal arrangement. Appellant repeats the statement made on page 6 as to national advertising, credit cards and uniform painting, with the same transcript references. We have already analyzed that evidence.

Appellant then states:

> "The jury may infer that Phillips gave Bridges the authority to act for it in conspiracy to fix gasoline prices."

No authority is cited for that bald statement; none exists.

Section 93-1301-2 of the Revised Codes of Montana defines an inference as follows:

> "93-1301-2. (10601) Inference defined. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect."

Under Montana law, an inference cannot be based on another inference or on a presumption. The Montana Supreme Court so held in *Monforton v. Northern Pacific Railway Company*, 138 Mont. 191, on 211, 355 P. 2d 501 (1960).

The following statement from *State v. Barick*, 143 Mont. 273, 389 P. 2d 170 (1964) is almost startlingly apposite to appellant's contentions:

> "[6] An inference is to be distinguished from mere suspicion which is defined as 'the act or an instance of suspecting: imagination or apprehension of something wrong or hurtful without proof or on slight evidence; * * *' Webster's New International Dictionary (3rd ed. 1961)." (p. 283)

Actually, nothing referred to by appellant justifies even a suspicion that Bridges was an agent of Phillips. Appellant's position amounts to asking this court to disbelieve uncontradicted evidence which the lower court accepted.

We challenge appellant to set forth in its brief any specific evidence on which it bases its contention that the jury could have inferred that Bridges had authority to act for Phillips in any conspiracy.

Phillips did not have any contact with the individual appellees other than Bridges, the independent jobber, except through its district representative, Don Hamilton, and all he knew was that Bridges proposed to lower prices at his own station. As we have shown the lower court found that at the meeting he attended "there were no agreements reached; that the price was discussed." (Tr. 177)

The record is so completely lacking in any evidence

that Phillips had any knowledge or notice of a conspiracy among the individual appellees that the lower court could not have held otherwise.

III. Appellant's Cases Not In Point

At the outset we wish to state that we have examined every case cited in appellant's brief and that none is even remotely in point on the facts as to conspiracy.

It is axiomatic that a major oil company cannot be charged with notice or knowledge of a conspiracy merely because a *jobber* who purchases gasoline from it, which he is free to dispose of as he pleases, advises the company that he intends to lower retail prices at a retail gas station which he owns and operates. That is exactly the situation here.

Appellant does not make any claim that any case cited by it is even remotely in point; indeed, appellant does not set forth the fact situation in any case cited by him and with good reason, for none of the cases cited has even the slightest resemblance on the facts to the case at bar.

IV. Statutes Involved

Appellant relies on section 1 of the Sherman Act (15 U.S.C.A. sec. 1) making illegal every combination or conspiracy in restraint of trade or commerce, and on section 2 of that Act[8] providing that monopolization or attempt to monopolize or conspiracy with any other person to monopolize any part of the trade

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[8] These statutes are set forth in the Appendix at page 2.

or commerce is a violation of the anti-trust laws. (Appellant's brief, pp. 15, 16)

CONTROLLING AUTHORITIES

"The plaintiff in a suit for damages under the anti-trust laws has the burden of establishing the alleged monopoly, conspiracy and restraint of trade."

(Toulmin's Anti-Trust Laws, Vol. VI, sec. 16.49, page 461)

Appellant recognizes that it has the burden of proving by a preponderance of the evidence that Phillips was a party to the alleged conspiracy. (Appellant's brief, p. 21)

V. Presumption Of Lawful Conduct Has Weight As Evidence

Included in this burden of proof is the necessity of overcoming the presumption of lawful conduct, which presumption has weight as evidence.

Equitable Life Assurance Society v. Irelan, 123 F. 2d 462, 464 (9 Cir. 1941).

State v. Rice, 134 Mont. 265, 272, 329 Pac. 2d 451 (1958).

See also 16 Am. Jr. 2d, Conspiracy, sec. 59, p. 156 and 15A C.J.S., Conspiracy, sec. 28, p. 688.

VI. Flintkote v. Lysfjord, 246 F. 2d 368 (9th Cir., 1957)

With the above foundation, the decision of this court in *Flintkote* leads to the indubitable conclusion that the judgment below must be affirmed; in *Flintkote* this court:

(1) Quoting from its decision in *Weniger v.*

United States, 47 F. 2d 692 on 693, said on page 374 of *Flintkote:*

> "The law requires proof of the common and unlawful *design and the knowing participation therein of the persons charged as conspirators* before a conviction is justified." (Emphasis supplied)

(2) Quoting from *Johnson v. J. H. Yost Lumber Co.*, Cir., 117 F. 2d 53, on 61, said on page 376 of *Flintkote:*

> "A fraudulent conspiracy may be shown by circumstantial evidence, *but the facts and circumstances relied upon must attain the dignity of substantial evidence* and not be such as merely to create a suspicion." (Emphasis supplied)

Appellant quotes from only two cases on the subject of conspiracy. Neither is in point.

The first is *Ingram v. Phillips Petroleum Company*, 252 F. Supp. 674 (1966).

The matter was before the District Court of New Mexico on motions for summary judgment. (p. 675) The defendants were seven major oil companies. The plaintiffs were jobbers for Phillips Petroleum Company (p. 676) Plaintiffs complained of unlawful price discrimination (p. 676) which is not involved in any way in the case at bar.

As to conspiracy, which is the only feature of *Ingram* which could be applicable in the instant case, the court said on page 676:

> "It is alleged that 'This conspiracy has been accomplished by agreements and understandings among the defendants to fix the prices of gasoline in the area involved'."

The conspiracy count was based on *selective* price

reductions. (p. 679) Nothing more need be said to show that *Ingram* is not in point on the facts. Appellant makes no claim that it is.

Contradictory statements were made in the affidavits and depositions of the opposing parties. (p. 677)

The following quotations from the decision make it clear that the court denied summary judgment because a trial would give plaintiffs a better opportunity to establish a conspiracy if they could:

> "We must conclude from a study of the evidentiary material that the evidence of conspiracy is less than strong." (p. 678)
>
> * * *
>
> "A trial will afford to plaintiffs a better opportunity to establish the contention that the defendant's conduct is a part of a conspiracy on their part." (p. 679)

Contrasted to the situation in Ingram, the district court in the case at bar allowed appellant great leeway in trying to tie Phillips into a conspiracy and, after appellant had done its best, correctly granted Phillips' motion for a directed verdict.

Significantly, at the trial on the merits in *Ingram*, plaintiffs dismissed their claims under the Sherman Act. *(Ingram v. Phillips Petroleum Company*, 259 F. Supp. 176, on 178 (1966).

Ingram affords appellants here no aid or comfort whatsoever. The fact that plaintiffs quit on the conspiracy charge is, on the other hand, favorable to Phillips in the case at bar.

Under the heading "Participation" appellant quotes

on page 27 from *United States v. Ward Baking Co.*, 224 F. Supp. 66 (1963).

The very first sentence of the quoted language is in complete accord with our contentions. It reads:

> "A person does not become liable as a conspirator *unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof.*" (Emphasis supplied) (Appellant's brief p. 27, decision p. 69)

In the *Ward* case the evidence of conspiracy and of defendant's participation therein was clear and abundant. It is set forth in detail on pages 71 and 72; since appellant does not make any contention that it is in point, we merely refer the court to those pages.

Since Phillips had no notice or knowledge of any conspiracy, it certainly could not perform any act in furtherance thereof.

VII. Competitive Price Allowance No Evidence of Conspiracy

While appellant refers to the competitive price allowance on pages 7 and 21, the brief does not attempt to make any point of it, for these are the only pages which mention it. Clearly, since it did not occur for some three months after the Helena retail dealers lowered their prices, it cannot be evidence that Phillips was a party to a conspiracy when the retail prices were lowered.

If appellant contends or seeks to infer that by granting the competitive price allowance to Bridges, Phillips became party to an existing conspiracy among the dealers, there are two complete answers.

First, Phillips had no knowledge or notice of any conspiracy, if one existed; and second, the law is clear that competitors may always allow price reductions to meet competition.

That principle is laid down in *McWhirter v. Monroe Calculating Mach. Co., Inc.* 76 F. Supp. 456 (1948), where the court says on page 462:

> "It is a well established principle of law that notwithstanding what the established trade practices and customs between competitors may be, *competitors may always allow such discounts and reductions in price as may be necessary to meet competition.*
>
> * * *
>
> "When he knows what his competition is going to do in the way of making discounts, he may formulate his policy in such a manner as to meet that competitive situation." (p. 462, Emphasis supplied)

The correctness of the principle is self-evident. Phillips did not grant the competitive price allowance until after the other suppliers had reduced their prices in Helena. To forbid Phillips to meet that competition would be to dry up its Helena market.

VIII. Attempt to Monopolize

Appellant's brief devotes pages 28 and 29 to a discussion of monopoly.

The opening paragraph reads as follows:

> "The testimony shows that Phillips, and the other major oil companies, controlled eighty per cent (80%) of the gasoline market in the State of Montana and in the Helena area (Tr 27); that the price lowering was aimed at the 'Independents', particularly Gasomat (Tr. 109) and others, and that the gas prices were lowered to

> such an extent that the Appellant, an 'Independent' was forced out of business (Tr. 43, 44). Thus, the attempt to monopolize as prohibited by the Sherman Act."

The record does show that the major oil companies sold eighty per cent (80%) of the gasoline sold in the Helena area. (Tr. 27) The record also shows that gasoline of the following companies was being sold in Helena in addition to Phillips: Union Oil Company, Texaco, Husky, California Company, Continental Oil, and Standard Oil Company (Tr. 88), and Big West. (Tr. 10)

There is no showing what per cent Phillips or any other supplier had; there has never been any claim that the suppliers conspired to monopolize the market. Certainly appellant does not contend that the fact that a number of manufacturers sell a large per cent of a given product sold in a given area constitutes them conspirators or creates a monopoly. It is common knowledge that oil companies are fiercely competitive and that there are so many of them that no single one can monopolize a given market the size of Helena.

Appellant refers to page 109 of the transcript, apparently with at least the inference that the price lowering by the individual appellees was aimed at the independents, particularly Gasomat. Reference to page 109 shows that the witness was appellee Bridges and that he was testifying about lowering the price at his own station. In that context he stated:

> "My only intent was to meet the competition

of the Gasomat, which was my immediate competition."[9]

The important fact, so far as Phillips is concerned, is that the uncontroverted evidence shows that Phillips had nothing whatsoever to do with Bridges' lowering his price.

Appellant then states that gas prices were lowered to such an extent it was forced out of business.

Once again apellant has failed to connect Phillips with the transaction. We have shown (supra p. 15) that Bridges was not an agent for Phillips; it follows that Phillips is not responsible in any manner for Bridges' actions.

The next statement is an absolute non-sequitur. It reads:

"Thus, the attempt to monopolize as prohibited by the Sherman Act."

In other words, having failed to charge any attempt to monopolize by the wholesale gasoline suppliers, appellant in effect says that because Bridges lowered the price at his own station, Phillips is guilty of monopolizing the market, although at least eight major suppliers remained actively in competition in the Helena market.

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[9] Gasomat was an automatic coin-operated station (p. 109) about a block and a half from Bridges' own station and the only other gasoline outlet in the immediate area. (Tr. 111) Gasomat was selling gasoline for 29.9 cents a gallon (Tr. 49), eight cents a gallon less than Bridges' price before he lowered it, and four cents less afterwards. (Tr. 96)

IX. Klor's v. Broadway-Hale Stores

Appellant concludes its argument on monopoly with a long quotation from *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 3 L. Ed. 2d 741, 79 S Ct. 705. (Br. pp. 28, 29)

In that case plaintiff and defendant operated adjoining stores in San Francisco; both sold radios, television sets, refrigerators and other household appliances. Klor's charged that Broadway-Hale and ten national manufacturers and their distributors conspired to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Act (359 U.S. 208), and not to sell to Klor's or to sell to them at discriminatory prices. (359 U.S. 209)

Defendants did not dispute the allegations but sought summary judgment and dismissal of the complaint for failure to state a cause of action, and submitted unchallenged affidavits showing that there were hundreds of other household appliance retailers selling similar appliances. (359 U.S. 209, 210)

The district court held that it was a "purely private quarrel" between Klor's and Broadway-Hale and dismissed the complaint. (359 U.S. 210)

This court affirmed on the ground that there was no showing the public was injured. (359 U.S. 210)

The Supreme Court held that the complaint clearly showed a prohibited group boycott and that defendant's affidavits provided no defense to the charges. (359 U.S. 210, 212)

To state the facts is to distinguish the case at bar from the *Klor's* case. In our case there is no claim

that the supplier of gasoline conspired to deprive appellant of its supply of gasoline; in other words, there is no charge of a group boycott, which was the basis for the decision in *Klor's*.

There is simply no proof and no contention in appellant's brief that Phillips monopolized appellant's supply of gasoline. Appellant continued to obtain its gasoline from the same source until it went out of business.

Klor's simply is not applicable.

X. Recapitulation

The following recapitulation of what the record shows as to appellant's contentions is set forth to summarize the situation for the court:

Appellant's Contentions:	*The Record Shows:*
1. Phillips owned or leased some of the stations.	1. But Bridges was a jobber, purchasing gasoline from Phillips but free to dispose of it to whom and at such prices as he saw fit (Tr. 98, 99) Phillips had no control over prices at retail level. (Tr. 79)
2. Bridges talked with Phillips' district manager in Spokane.	2. Bridges told district manager he was planning to lower prices at retail level. (Tr. 79) *Phillips positively refused to give any assistance.* (Tr. 81)
3. Phillips' district representative Hamilton was present at meeting of individual appellees in March 1964 where they discussed lowering of retail prices.	3. All individual appellees were present; Bridges said he was going to lower his retail prices, but there was on discussion of what would happen if prices were lowered. (Tr.

Appellant's Contentions:	*The Record Shows:*
	159, 160) *And that is all.* There is no evidence in the record of Hamilton participating in any way or of any discussion of "Independents."
4. Later in July 1964 Phillips paid a "subsidy," which insured individual appellees of 5c a gallon profit.	4. In July 1964 Phillips granted Bridges, the jobber, a 5c a gallon *competitive* price allowance which he could pass on or keep for himself. (Tr. 92) This was done only after other majors had reduced prices. The Trial Court specifically found there could not be an antitrust violation "in the absence of some knowledge that an illegal conspiracy had been created by the individual defendants." (Tr. 181)
5. Appellant infers Phillips participated in a conspiracy to lower prices to hurt Uniform as an independent.	5. The Trial Court clearly found that there was no evidence that Phillips had any knowledge of a conspiracy, if one existed, (Tr. 177-180) Specifically the Trial Court made the finding that if a conspiracy existed as to the individual defendants "there is not sufficient evidence now—to indicate that defendent Phillips Petroleum Company had any knowledge of that conspiracy." (Tr. 181)

CONCLUSION ON CONSPIRACY

The lower court was right in granting the motion of appellee Phillips for a directed verdict and in entering judgment in favor of Phillips because appellant did not prove that Phillips had any knowledge or notice of any conspiracy among the individual appellees, if one existed.

INTERSTATE COMMERCE

Even if appellant had established a conspiracy to which Phillips was a party the judgment in favor of Phillips (R. p. 60) must nevertheless be affirmed because of appellant's utter failure to sustain its burden of proof that there was any restraint on trade or commerce.

I. The Conspiracy Charged Was Price-Fixing at Local Level

The conspiracy charged was price-fixing of Phillips products at the local level in Helena, Montana, and was intrastate in character. Paragraph 13 alleges that defendants combined and conspired "to monopolize and restrain trade in and to eliminate competition from the gasoline marketing industry *in the City of Helena, Montana,*" and " to destroy the business of the plaintiff and other Independents and to eliminate *from the City of Helena* all of the Independents." (Emphasis supplied)

Paragraph 14 alleges that Phillips and the individual appellees, all of whom operated retail gasoline stations *in Helena* (paragraphs 4 to 8), conspired to reduce retail prices of gasoline at the retail stations of the individual appellees. (paragraph 14 A)

There can be no question that the conspiracy charged was price-fixing of Phillips gasoline sold at retail stations at the local level *in Helena.*

The conspiracy charged involves and is concerned only with the *Phillips'* products sold at retail; it was not charged that there was any conspiracy as to the products sold by appellant.

Before discussing the evidence proffered by appellant, we wish to clarify the underlying principles.

II. The Controlling Principles

The applicable law, so far as the issue of interstate commerce is concerned, is spelled out by this Court in *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (1954), cert. den. 348 U.S. 817.

This case involved appeals of eleven defendants who had been convicted of violations of "sections 1-7, 15 note" of the Sherman Anti-Trust Act. Section 1 and 2 are the same sections which defendants in the case at bar are charged with violating. None of the other sections referred to in *Las Vegas* are relevant for present purposes,[10] so *Las Vegas* is on all fours with the case at bar so far as the *legal issues* with respect to interstate commerce is concerned.

In *Las Vegas* this Court held that there was ample proof of the conspiracy charged and went on to discuss

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[10] Section 3 relates to conspiracies in restraint of trade in territories and in the District of Columbia; section 4 covers jurisdiction of courts and duties of United States attorneys; section 5 is concerned with bringing in additional parties; section 6 with forfeiture of property in transit and section 7 with the definition of "Person"; section 15 authorizes suits by persons injured and provides for treble damages.

the interstate commerce issue.

The indictment charged both that the plumbing and heating supplies in question were in the flow of interstate commerce (pp. 738, 740) and there was a substantial effect on commerce. (p. 741)

The evidence in *Las Vegas* showed that no plumbing and heating supplies used in Southern Nevada were manufactured in Nevada; they moved in interstate commerce from eastern factories and from California; 46% were shipped directly to plumbing contractors; some were purchased by the contractors from a Nevada wholesaler who obtained them from out-of-state sources; some were purchased from the wholesaler pursuant to prior orders and substantial quantities of the supplies sold by the wholesaler were shipped by his out-of-state sources directly to plumbing contractors on the wholesaler's order.

This Court held that on this evidence the trial court properly left to the jury the question whether the flow of materials was *in* commerce. (p. 745)[11]

On the subject of effect on interstate commerce this Court, after stating that a price-fixing conspiracy which operates on or within the flow of interstate commerce affects that commerce as a matter of law, continued on page 747:

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[11] At page 31, post, we contrast the evidence in the case at bar and show that the product here in question (the Phillips gasoline sold at the retail gas stations of the individual appellees) was not in commerce.

> "But a price fixing conspiracy at a purely local or intrastate level does not, as a matter of law, affect the flow of commerce. Whether a purely local or intrastate conspiracy unreasonably restrains interstate commerce is primarily a factual question, i. e. *does the local price fixing conspiracy affect substantially the flow of interstate commerce?* If the answer is yes, then only are we concerned with the effect of the price-fixing under the per se doctrine. *In fact, unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment, substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation.*" (Emphasis supplied)

This Court reasserted this rule of law in the companion civil cases of *Marietta Page v. Work*, 290 F. 2d 323 (1961) and *C. A. Page Publishing Co., Inc., v. Work*, 290 F. 2d 334 (1961), cert. den. 368 U.S. 875, which at page 337 adopts the *Marietta Page* opinion.

Appellant in the *Page* cases contended that the acts charged constituted *per se* violations of Section 1 of the Sherman Act, and that, where a *per se* violation has been made out, "federal jurisdiction attaches, and that the amount of interstate commerce affected by such restraints is immaterial." (p. 331)

This Court summarily disposed of that contention in the following language on page 331:

> "The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce. *The argument made here by appellant has been squarely rejected by this Court in Las Vegas Merchant Plumbers Ass'n v. United*

States, 9 Cir., 1954, 210 F. 2d 732, 747 * * *." (Emphasis supplied)

The opinion then quotes the language above quoted from *Las Vegas*.

III. The Gasoline Sold By Phillips To Bridges Was Not In The Flow Of Interstate Commerce

There is absolutely no evidence from which a jury could have found that the product in question in the instant case (Phillips gasoline) was in the flow of commerce, and appellant does not contend that there is. Neither on page 5 nor on pages 17 and 18, which are the only places in appellant's brief where the subject of interstate commerce is discussed, is there any reference to where the gasoline sold by Phillips to Bridges, the jobber in Helena, and by him resold to appellees Gardner, Cullen and Norwood in Helena, was refined, or from what point it was shipped to Bridges.

Neither is there any evidence whatever on either of these subjects.[12]

All that appellant *did* prove was that Bridges was the jobber for Phillips products in Lewis and Clark County (Helena is the county seat) and that appellees Cullen, Gardner and Norwood acquired the gasoline which they sold at their retail stations in Helena from Bridges as jobber. (Tr. 31, 32). These transactions were clearly intrastate in character.

It goes without saying that as a matter of law activities which are intrastate in character cannot be

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[12] It does appear from the testimony of appellant's president that Phillips had a refinery in Great Falls, Montana. (Tr. 46)

in the flow of interstate commerce.

Since there is no evidence and no contention that the Phillips gasoline which was claimed to be the subject of a price-fixing conspiracy was *in* commerce, appellant had the burden of proof that the (alleged) conspiracy had a substantial effect on interstate commerce under the holdings in the *Las Vegas* and in the *Page* cases. Appellant completely failed to sustain this burden.

IV. There Is No Evidence At All That Commerce Was Substantially Affected

The only possible basis for a claim that commerce was substantially affected would require a showing by a preponderance of the evidence that the effect of the (alleged) conspiracy on appellant's sales substantially affected commerce.

In this connection we call attention to the wholly unjustified inference sought to be created at pages 5 and 7 of appellant's brief that the gasoline it purchased from Yellowstone Pipe Line at Helena was refined from Wyoming crude. There is no direct statement in the brief to that effect, and the record shows why no such statement can be made.

What the record does show is: that appellant's gasoline was obtained from Big West Oil Company, a Montana corporation; approximately one-half came from the Big West refinery at Kevin, Montana; that the balance was delivered at Helena by the pipe line company from a pipe line running from Billings, Montana, to Spokane, Washington (Tr. 12); that the pipe line was owned by major oil companies, including

Carter (now Humble), Continental, Union, Enco and Husky; and *that the gasoline carried by the pipe line "was refined in Billings*, mostly from crude, from the Elk Basin Field in Wyoming." (Tr. 13)

There is not one word in the entire record showing or indicating that any of the gasoline which appellant purchased was refined from Wyoming crude, and appellant made no effort whatsoever to produce any proof that it was.

Actually, under the authorities, proof that the crude oil from which the gasoline refined in Billings came from Wyoming would not have helped appellant; its operations would still be intrastate in character.

This is the holding in *Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company*, 203 F. Supp. 529 (1962), which involved sections 1 and 2 of the Sherman Act, as does the case at bar.

In *Savon*, plaintiffs operated a retail gas station in Maryland (p. 531); plaintiff's gasoline was bought by plaintiff, A. & H. Transportation Inc., or by the president of plaintiff, trading as Arrow Oil Company, at terminals in the Baltimore area; the terminals acquired the gasoline and other petroleum products from out of state sources. Delivery from the terminals was effected by trucks; plaintiffs also bought various items of service station equipment from out of state sources. (p. 533)

After outlining these facts the court said on page 534:

> "While there are certain interstate aspects in the acquisition of the products plaintiffs sell, and the equipment to make sales and render services

at retail, the decided cases indicate that the retail sale of gasoline, and related products, is intrastate in character. See *Mitchell v. Livingston & Thebaut Oil Company*, 256 F. 2d 757 (5 Cir. 1958); *Brenner v. Texas Company*, 140 F. Supp. 240 (D.C., N.D., Cal. 1956); *Dial v. Hi Lewis Oil Co.*, 99 F. Supp. 118 (D.C., W. D., Mo. 1951); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (D.C., S.D., Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D.C., Conn. 1950); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (3 Cir. 1946); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (D.C., N.D., Ill. 1943)."

The cases cited in the quotation from *Savon* amply support the holding.

The Court of Appeals for the Fourth Circuit affirmed in *Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company*, 309 F. 2d 306, (1962), cert. den., 372 U. S. 911.

There is no proof of *any* effect of appellants' operations on interstate commerce. What the record shows as to appellant's operations is the following:

Appellant proved by its president that all of the gasoline sold by it was refined in Montana. (Tr. 13)

Appellant operated only one station and that was *in Helena.* (Tr. 8, 9) There is no testimony that any gasoline sold by appellant ever crossed a state line. Courts can take judicial notice of the distance from Helena to the boundaries of Montana; it is self-evident that only an infinitesimal percentage of the gasoline sold by appellant (appellant's highest volume was only two hundred thousand gallons a year (Tr. 43)) could possibly go out of Montana, and then

only in the gas tank of a motor vehicle. There certainly is no evidence of substantial effect on interstate commerce on these facts.

So far as credit cards are concerned, there is no evidence whatsoever as to the amount or volume of credit card business and consequently no basis for an argument that it had any effect on interstate commerce; and appellant does not attempt to argue this point.

Conclusion On Interstate Commerce

The conspiracy charged was price-fixing with regard to Phillips products sold in Helena. There was no attempt to show that those products were *in the flow of commerce.* That being so appellant had to show a substantial effect of the (alleged) conspiracy on interstate commerce. There is no evidence of any such effect, or any effect whatever, on interstate commerce. It follows that the judgment below should be affirmed on this separate ground.

DAMAGES

The only proof as to damages in the entire record is the unsubstantiated statement of appellant's president that in his opinion the business had a going value of $60,000.00 prior to the reduction in gasoline prices in Helena in March of 1964. (Tr. 46)

That opinion was elicited when appellant's counsel asked his witness Vance, president of Uniform Oil Company:

> "Do you have an opinion as to the value of that (Uniform's) business as a going business prior to the time that this——of the gas reduction?" (Tr. 45)

Counsel for Phillips and counsel for the individual appellees both objected, citing *Flintkote Company v. Lysfjord,* (9 Cir.) 246 F. 2d 368 (1957).

Vance was permitted to answer and stated:

> "As a going business I would say that that business was certainly worth Sixty Thousand Dollars." (Tr. 46)

Appellant's counsel did not attempt to produce any other evidence on the question of damages.

On cross-examination by counsel for Phillips, Mr. Vance stated that he did not have with him any information on the month-by-month volume of gasoline in the year 1964 compared to 1963, (Tr. 52); counsel for Phillips showed him his deposition and after examining it, he admitted that during the months of March, April and May, 1964, the total gallonage exceeded that for the same months in 1963. (Tr. 52, 53) The "gas war" started in March, 1964.

Appellant's argument on the subject of damages consists of a single paragraph on page 30 of its brief. There is no contention that the bald statement of Vance is sufficient. All that appellant says is that appellant was entitled to fair compensation and that:

> "The fact that the precise amount of appellant's damage may be difficult to ascertain should not affect Appellant's recovery, particularly if the defendant's wrongdoings have caused the difficulty in determining the precise amount."

Appellant cites three cases in support of that statement; as we shall show, none of them comes close to holding that the evidence of Vance is sufficient; actually these cases show clearly that it is not.

If appellant had argued that Vance's testimony was sufficient, it would have run head-on into three decisions of this court.

The first is *Flintkote*, the case cited by counsel for Phillips in support of his objection.

In *Flintkote* this court had this to say on the subject of damages:

> "There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion *based on items (1) or (2)*. (p. 392)
>
> * * * *
>
> "We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, *the record must show their competency and the factual basis upon which they rest their conclusions.* (p. 394, Emphasis supplied.)

Even if it be assumed that the record showed the qualifications of Vance, which is extremely doubtful, no effort was made by appellant to show through Vance, or any other witness, "the factual basis" for his conclusion.

The second decision of this court which appellant would have had to surmount if it had tried to show the sufficiency of its proof on damages is *Standard Oil Company of California v. Moore*, 251 F. 2d 188, cert. den. 356 U.S. 975 (1958). That decision is controlling here.

In that case Moore claimed that his retail gasoline business was destroyed (195) by refusal of Standard and others to supply him with gasoline (196). Moore had retained his land and capital assets, so "the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value." (219) In the instant case appellant sold part of its land to the State Highway Department and the balance to a Butte man, (Tr. 44); the amounts received are not disclosed but it must be presumed those amounts were the market value. The only remaining value was the "going concern" value. Appellant's president fixed that value at $60,000.00 (Tr. 46) "as a going business," but in the light of his failure to produce any supporting figures, either on direct or cross the following statement from page 219 of *Moore* is applicable to appellant's proof:

> "In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made *over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?* (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16-17, 69 S. Ct. 1434, 93 L. Ed. 1765. These are the factors which would influence a prospective purchaser." (Emphasis supplied)

Appellant made no attempt whatsoever to produce that type of proof.

The third case is *Lessig v. Tidewater Oil Company,*

327 F. 2d 459 (1964). In that case plaintiff-appellant complained that he was not permitted to state his opinion as to the profit which he lost as a result of Tidewater's alleged misconduct. This Court rejected his complaint and disposed of his contention in this language:

> "Such opinion testimony is admissible, but only if based upon facts which rationally support it. The offer of proof was simply that it was Lessig's opinion, based upon his experience and knowledge, that but for Tidewater's restrictive practices his earnings would have approximated seven hundred dollars a month, or about four hundred dollars per month more than he in fact averaged. *There was no offer to show how his estimate was made. The testimony was inadmissible, absent this foundation, and it was* ex-excluded upon that express ground." (pp. 473, 474) (Emphasis supplied)

A slightly different approach, reaching the same result, is found in the decision of the Montana Supreme Court in *Brown v. Homestake Exploration Company*, 98 Mont. 305, 39 Pac. (2d) 168 (1934). The action was based on alleged failure to develop an oil property. The Court held that the fact that the amount of damages is difficult of ascertainment will not result in denying them *if the best obtainable evidence is produced.*

In *Homestake*, the Court said on pages 337 and 338:

> "A reasonable basis for computation and the best evidence obtainable under the circumstances and which will enable the jury to arrive at a reasonably close estimate of the loss is sufficient. *(Hofer Oil Corp. v. Carpenter*, supra; *Eastman*

Kodak Co. v. Southern Photo Material Co., supra; *Kennett v. Katz Construction Co.*, supra; *Osterling v. Frick*, 284 Pa. 397, 131 Atl. 250; *Prejean v. Delaware-Louisiana Fur Trapping Co.*, (C. C. A.) 13 Fed. (2d) 71.)"

Uniform made no effort whatsoever to produce the best available evidence. It made no attempt to support its president's estimate that the "going concern" value was $60,000.00. It did not even show to what date that estimate applied. On cross-examination its president nonchalantly admitted that he had no comparative records for 1963 and 1964 (Tr. 52); neither he nor Uniform's counsel offered to obtain and supply such figures; he did admit that gallonage sales during the first months of the "gas war" exceeded those for the corresponding period in the previous year. (Tr. 53) Comparative figures were essential under the best evidence rule. The unsupported testimony that the "going concern" value was $60,000.00 was improperly admitted.

Even if it were to be considered as properly admitted it is still without probative value because appellant did not even attempt to supply the best evidence, which would at the very least include figures on previous profits, if any, and proof of a reasonable prospect that such profits would have continued. *(Standard Oil Company v. Moore*, supra).

None of the three cases cited by appellant on page 30 of its brief detracts in the slightest degree from the above rules. Rather, these cases themselves show that appellant's attempt to prove damages was a woeful failure.

In the first case, *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946), plaintiff submitted detailed evidence on two theories designed to show loss of profits. (257, 258)

The Court of Appeals rejected both theories (259, 260)

The Supreme Court stated on page 262 that

> "The fair value of petitioner's right thus to continue their business depended on its capacity to make profits."

and went on to say that

> "even though RKO's acts precluded ascertainment of damages more precisely, an award cannot be based on guesswork." (264)

This Court in *Flintkote*, quoting from *Bigelow*, said on page 394:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

Bigelow, as the above quotations show, precludes an award of damages in the instant case.

The next case is *Pennington v. United Mine Workers*, 325 F. 2d 804 (6 Cir. 1963).

The union brought an action to recover royalties under an agreement and defendants filed a cross-claim for damages under the Sherman Act (806, 807); Defendants introduced evidence showing the amount of their shipments over a three year period, a comparison of the prices received with the national average price over the same three years (815), and the potential market. (816)

This evidence certainly afforded a basis for a finding of loss of profits; appellant in our case did not even attempt to show loss of profits. The simple fact is that there is no evidence whatsoever in the entire record that appellant here ever made a profit, either before or after the "gas war."

The third and last case cited by appellant on damages is *Richfield Oil Corporation v. Karseal Corporation*, 271 F. 2d 709, decided by this Court in 1959.

This case so strongly supports Phillips' position that we would have cited it and quoted from it if appellant had not cited it.

In that case Karseal offered credible proof of the salability of its product as compared to a competitive product, the amount of the latter sold at Richfield stations, that Karseal could supply the amount in question and Karseal's net profit per case. (714). This court held on page 715:

> "Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and salability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant. There was here proof of such matters."

In the case at bar there is no evidence of any of the following:

1. The extent and period of the "gas war."
2. Salability by appellant.
3. The profit made on sales, or
4. Any estimate of the amount of profit lost.

The evidence in the three cases relied on by appellant is in such sharp contrast to the wholly unsupported guess upon which appellant relies in our case that further comment as to that contrast would

As we have shown, Phillips was not guilty of wrongdoing, so no wrongdoing on its part could have caused any difficulty in establishing damages.

Additionally, appellant sought to base its claim for damages on the value of its business as a going concern at the time gasoline prices were reduced in Helena. (Tr. 45, 46) No one could claim, even on appellant's theory, that any action of Phillips could have caused any difficulty in showing profits prior to that date. Appellant had to determine profits, if any were made, as a basis for filing income tax returns. For some reason appellant chose not to present the available evidence. Its attempt now to place on Phillips the blame for its failure must fall flat on its face.

Wholly apart from any other reason, the judgment below should be affirmed because of the total and complete failure to produce any probative evidence as to damages.

CONCLUSION

The judgment of the lower court should be affirmed on each of the following grounds separately:

1. The lower court's findings that Phillips had no notice or knowledge of any conspiracy among the individual appellees, if one existed, are fully supported by the evidence.

2. Appellant failed to prove that the transactions involved were in commerce; under the authorities they were *intrastate* in character and there was no showing that they substantially affected trade or commerce.

3. Appellant did not prove any damages.

Respectfully submitted,

LEWIS J. OTTAVIANI,
Bartlesville, Oklahoma

Kendrick Smith

CORETTE, SMITH, DEAN & WELLCOME

By Sam B. Chase

Attorneys for Appellant
Phillips Petroleum Company

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Sam B. Chase

Attorney

CERTIFICATE OF SERVICE BY MAIL

I, KENDRICK SMITH, Attorney for appellee Phillips Petroleum Company, hereby certify that the foregoing brief of said appellee was served on each of the following:

Lloyd J. Skedd, Esq.
Third Floor
Horsky Block
Helena, Montana
Attorney for Appellant

Gene Picotte, Esq.
c/o Loble, Picotte & Fredricks
833 North Main Street
Helena, Montana
Attorney for Appellees W. J. Bridges, Donald W. Cullen, Curtice Gardner and James H. Norwood

by mailing three (3) copies to each at their address above set forth this 14 day of September, 1967.

Kendrick Smith
KENDRICK SMITH
Attorney for appellee Phillips Petroleum Company.

CORETTE, SMITH, DEAN & WELLCOME
Professional Building
Butte, Montana

APPENDIX

WESTERN UNION

6-23-64

Defendant's
Exhibit
Cv. 1132
Ind. Def. No. 1

Phillips Petroleum Co.
Home Office
Bartlesville, Oklahoma

Attention: Mr. S. E. Floren
Legal Department

In re: William J. Bridges, d/b/a
W. J. Bridges & Son—Helena Jobber

Gentlemen:

The above-named jobber is facing financial ruin by reason of his inability, and the inability of the retail dealers to whom he sells, to compete price-wise in the local gasoline market. Said retail dealers are likewise facing ruin. This situation stems from the following facts:

The other majors and other suppliers are subsidizing their jobbers, consignees and dealers in the local market, and have been doing so since about June 1, 1964. You have refused to assist Bridges and his dealers by subsidy or otherwise, although requested to do so. The result is that Bridges and said dealers are presently sustaining a combined net loss of three cents per gallon, and if they are not given immediate assistance by you, they will shortly be out of business and in the worst possible financial circumstances. The legal and business situations of Bridges and said dealers are such that they have no legal or practicable source of supply other than your company.

You are hereby requested to render immediate assistance to Bridges and said dealers in this matter,

either by way of subsidy or otherwise. Please advise immediately, by collect wire or telephone call, whether such assistance will be forthcoming or not, and when.

Gene A. Picotte
Attorney for William J. Bridges,
d/b/a W. J. Bridges & Son.

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed

guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine ont exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

No. 21,840

United States Court of Appeals

For the Ninth Circuit

EDWIN CORDEIRO and EDMUND LEWIS (individually and doing business as CORDEIRO AND LEWIS APPLIANCES),
Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY (a corporation),
Appellee.

Appeal from the Judgment of the United States District Court, Eastern District of California at Fresno, California
Honorable M. D. Crocker, Judge

APPELLANTS' CLOSING BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANTS' CLOSING BRIEF

FOREWORD

We have read with care Appellee's brief and believe that we have touched on all of the legal propositions involved and see no occasion to repeat here what we said in our opening brief.

Because of what we feel are misconceptions on Appellee's part as to the state of the record and the legitimate inferences to be drawn from it, we comment briefly on certain aspects of the case which, we

respectfully submit, require that the judgment be reversed.

---

1. APPELLEE'S ARGUMENT IN DEFENSE OF HOFFMAN IGNORES THE FACT THAT MILLER, APPELLEE'S GENERAL AGENT, WAS AWARE THAT THE APPLIANCE LINE, CONSTITUTING THE PRINCIPAL VALUE OF APPELLANTS' STOCK-IN-TRADE AND ALREADY COVERED IN CURRENT INVENTORY REPORTS SUBMITTED TO APPELLEE, WAS BEING MOVED TO THE NEW LOCATION.

Much space is consumed in Appellee's brief in defense of Hoffman.

We need not concern ourselves with the reasons why Hoffman did not perceive the obvious. Although Hoffman was a *special* agent of defendant, Miller was the general agent and the knowledge of Miller was sufficient to impose liability on the defendant under the rules discussed in our opening brief (pp. 16-19).

In this connection Miller testified as follows concerning the acquisition of the new location at 1105 Sixth Street and the meeting concerning insurance on that subject attended by Miller, Hoffman, Cordeiro and Lewis:

> "We discussed the coverage to some degree. It was pointed out that the heavy appliances and the stereos and everything was being moved over to the store and that's what they were doing at the time . . ." (RT 33:11-20)

For reasons not apparent in the record Hoffman, even at a very early date in the proceedings (cf. Defendant's Exhibit E), had either ignored what he saw and was told or was simply inattentive.

But, again, the knowledge of Miller was sufficient to bind the defendant and that is all we seek to do.

---

2. APPELLEE'S DEFENSE OF HOFFMAN, BASED ON THE CLAIMED (BUT NON-EXISTENT) INTENT OF PLAINTIFFS TO RETAIN THE APPLIANCE LINE AT THE OLD PREMISES AND THE CLAIMED FAILURE OF PLAINTIFFS TO FURNISH DEFENDANT WITH AN INVENTORY OF THE PROPERTY TO BE COVERED AT THE NEW LOCATION IS WITHOUT MERIT.

The litany that runs through Appellee's brief (pp. 6, 25, 27, 31, 35, 45 and 46) is summarized in the following passage (pp. 46-47):

> "The 'objective' situation at the time of the negotiations between Mr. Cordeiro and Mr. Hoffman was that Mr. Cordeiro was keeping the old store in *status quo* ('as is', he told Mr. Miller) and so advised Mr. Hoffman. 'Objectively', all Mr. Cordeiro wanted, asked for, and got, was insurance on the furniture store."

Appellee claims it was Cordeiro's "announced intention to retain the *status quo* on the old location" (Appellee's brief page 6), that Cordeiro "affirmatively represented that the old appliance store was going to continue to operate 'as is'" (page 25), and that "Cordeiro stated to Mr. Miller he intended to retain that operation 'as is'" (page 27).

Indeed, at page 35 Appellee assigns to Cordeiro an intention "to subsequently move a massive inventory of appliances into the new location" and asks how any insurance company could "divine what future commercial expediency would induce an insured to increase his inventory" (Appellee's brief page 35).

Defendant even suggests that Cordeiro violated "a traditional standard of private morality" (page 45), was guilty of a violation of Section 332 of the Insurance Code and, in effect, of constructive fraud (Appellee's brief pp. 30-31).

This colorful assault on Cordeiro involves a most extraordinary construction of Cordeiro's testimony as to what he told Miller, the defendant's general agent.

We quoted that testimony at page 8 of our opening brief and repeat it here for emphasis:

> "Q. First of all, where did the conversation take place?
>
> "A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that *we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and that I was to move my office and everything to the furniture store and then we would keep the other store as-is, with giftware, records and housewares business with the two women.* That is the extent of the conversation at that time." (RT 53:2-15)

If Miller's use of the expression "as-is" justifies the *"status quo"* arguments advanced in Appellee's brief, we believe that plain language has lost its meaning.

Nor was there anything equivocal in Cordeiro's statement to Hoffman (RT 56:16-22):

"Q. All right. Did you tell Mr. Hoffman what you were going to leave in the old store, the old location?

"A. I just told him we were going to bring our appliances and run our furniture and appliances together in the new location, that we were just going to keep the inventory, as far as the other was concerned, strictly housewares, small appliances, records and giftware."

Interlaced with Appellee's *"status quo"* argument is its claim that the inventory given it by Cordeiro did not set forth an inventory of the line of appliances which were being moved to the new location.

Defendant's representatives attended the trial of the action and are well aware that the written inventory given by Cordeiro to the defendant during negotiations involving the placing of insurance on property at the new location was an inventory of the furniture purchased by Cordeiro and already located at the new location (RT 54:7-57:5, quoted at pages 9-12 of our opening brief).

The defendant at monthly intervals for more than a year had already been receiving inventories from the plaintiffs of plaintiffs' stock-in-trade, which as the defendant was admittedly aware, consisted primarily of the appliance line. (Rider No. 1 of Plaintiffs' Exhibit 6; testimony of Girdlestone, RT 97:4-98:2; and testimony of Hoffman, RT 134:12-135:4)

The defendant already had that inventory and it would have been idle to have supplied on a separate piece of paper a restatement of that inventory when

the defendant—at least through its agent Miller—was aware that the appliance line was being moved to the new location.

If the defendant desired a single piece of paper listing all the items which were being purchased by Cordeiro in the new store as well as a seriatim description of the appliances which were being moved to the new store, the defendant should have requested such an inventory.

---

3. APPELLEE'S BRIEF FAILS TO ANSWER OUR CONTENTION THAT IT WAS PREJUDICIAL ERROR FOR THE COURT TO EXCLUDE PLAINTIFFS' EXHIBIT 9.

Whatever may be said or denied concerning the role of Hoffman in this matter, the fact is that the form of report furnished by the defendant to the plaintiffs only required the plaintiffs to make a "statement of values wherever located".

There was no suggestion in the form (Plaintiffs' Exhibit 5) that a different report should be made with respect to each address where property was located or that the items reported should be segregated according to the place of their location.

We pointed out in our opening brief (page 24) that the Standard Form Bureau form of reporting (Plaintiffs' Exhibit 9 for identification) would immediately have called to the attention of the insured or its employees that the insurer required a segregation of inventory as between the various addresses where the property was located. Had such a form been used the

agent Miller, through whom these reports were submitted, as well as the defendant, would have been put upon immediate notice that the amount of inventory kept at the new location exceeded the claimed limits of liability and the situation would have been corrected long before the fire occurred.

Defendant's only answer to this argument is that "the insurer is totally indifferent to the kind of form which the insured may elect to use" (Appellee's brief page 43).

Indifferent it may be, but the fact is that it furnished the insured with a reporting form which, in view of the numerous representations made by Miller and Hoffman, led the insured to believe that the property was covered "wherever located", particularly in view of Hoffman's assurances to Cordeiro that he was getting "the best possible coverage" (RT 154: 20-24) and "had the same coverage that he had at the first location" (RT 155:2-3).

---

4. APPELLEE WHOLLY FAILS TO JUSTIFY OR EXPLAIN HOFFMAN'S FAILURE TO DISCLOSE THE LIMITATION ON HIS AUTHORITY WHICH RENDERED HIM INCAPABLE OF WRITING A POLICY OF SUFFICIENT LIMITS TO PROTECT APPELLANTS.

There is, as we pointed out in our opening brief (pp. 17-18), an affirmative duty on an insurance company "to call specifically to the attention of the policyholder [limitations upon the agent's authority]", as stated in *Raulet v. Northwestern etc. Insurance Co.* (1910) 157 C. 213, 230, quoted with approval in *Tom-*

erlin v. Canadian Indemnity Co. (1964) 61 C.2d 638 at 645.

Why did Hoffman fail to tell Cordeiro of the secret limitation on his authority which purportedly limited that authority to insure property at the new location to an upper limit of only $25,000?

If, instead of telling Cordeiro that Cordeiro was getting "the best possible coverage" and "the same coverage that he had at the first location", he had told Cordeiro he had no authority to insure for any sum in excess of $25,000, and that that sum might be insufficient for Cordeiro's operation, Cordeiro would not have been lulled into the false sense of security which has cost him and his partner a crippling loss.

---

5. CONCLUSION.

It is respectfully submitted that the judgment should be reversed and judgment entered for the plaintiffs in the amount of the prayer, or, alternatively, that the matter may be retried in the light of the principles above discussed.

Dated, San Francisco, California,
October 28, 1968.

Respectfully submitted,
BLEDSOE, SMITH, CATHCART, JOHNSON & ROGERS,
ROBERT M. FALASCO,
By R. S. CATHCART,
Attorneys for Appellants.

NO. 21891

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK CARLINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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BRIEF FOR APPELLEE

I

STATEMENT OF JURISDICTION

On August 3, 1966, appellant was indicted in one count by the Federal Grand Jury for the Southern District of California, Central Division, for transporting a stolen motor vehicle in interstate commerce in violation of Title 18, United States Code, Section 2312 - The Dyer Act [C. T. 2]. 1/ Following a jury trial before the Honorable Albert Lee Stephens, Jr., United States District Judge, from October 18, 1966 to October 20, 1966, appellant Frank Carlino

---

1/ "C. T." refers to Clerk's Transcript.

was found guilty [C. T. 36].

Appellant was convicted and sentenced on November 14, 1966, to the custody of the Attorney General for four years [C. T. 42].

Appellant filed, on November 14, 1966, a Notice of Appeal [C. T. 44].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 3231 and 2312.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2312 provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

1. Whether the opening statement of the prosecutor caused reversible error.

2. Whether venue was proved.

3. Whether an instruction of the District Court Judge was reversible error and whether the issue was preserved on appeal.

4. Whether defendant was denied effective assistance of counsel.

IV

STATEMENT OF FACTS

On May 23, 1966, Thomas Cronin, an employee of Dollar A Day Rent A Car (in Los Angeles, California) rented a 1966 Ford to the appellant [R. T. 55-57]. 2/ As Exhibit 1, in evidence, shows, the car was to be returned on May 25, 1966 [R. T. 57]. At the time of the rental a $50 deposit was made and the appellant stated "he was going to need it [the vehicle] for a couple of days" [R. T. 58]. The contract was signed by appellant [R. T. 63].

By June 15 or 16, 1966, appellant met Kenneth Treece in Knoxville, Tennessee [R. T. 102]. At that time appellant had the relevant vehicle in his possession [R. T. 100], and within forty five minutes of appellant's meeting Treece, asked Treece to obtain license plates for the car [R. T. 102]. Appellant said he would "give anybody $50 to get him license plates" [R. T. 104]. At the same time appellant claimed ownership of the vehicle and stated that an attorney in Los Angeles had the ownership papers for the car [R. T. 102-03].

2/ "R. T." refers to Reporter's Transcript.

Later in June of 1966, appellant had the vehicle with him in Fairbanks, Alaska [R. T. 107-08].

Also in June of 1966, appellant had the car with him in Anchorage, Alaska, and within forty-five minutes of meeting Martin Gutwein, asked Gutwein about obtaining Alaskan license plates for the vehicle in question [R. T. 112-15]. At that time appellant told Gutwein that he was the owner of the vehicle and a lawyer had the bill of sale [R. T. 116-17].

In July of 1966, Arthur Willis noticed that his Alaska license plate number 46770 was missing [R. T. 119-121]. Said plate is the same as that found on the vehicle at the time of its recovery in Boulder City, Nevada, on July 21, 1966 [R. T. 186].

On July 15, 1966, appellant had the car in his possession in Boulder City, Nevada, bearing Alaska plates. On that date he told Larry McCollum, that he was the owner of the vehicle [R. T. 126-28]. At that time appellant stated he was going to Phoenix, Arizona, with the car, which direction is in the opposite direction of Los Angeles from Boulder City [R. T. 129].

On July 21, 1966, appellant was arrested in Phoenix and after being advised of his rights under the Constitution stated: (1) he drove the vehicle from Los Angeles to Fairbanks; (2) he made a $225 deposit on the car at the time of its rental; and (3) there was no limitation on the length of time he was to have the car [R. T. 132-35].

On August 4, 1966, upon being interviewed by a Special Agent of the Federal Bureau of Investigation, and after he was advised of

his rights under the Constitution, appellant stated: (1) he made a deposit on the rental of $275; (2) he had registered the vehicle in Alaska for 1966; and (3) he had not attempted to obtain plates for the vehicle in Tennessee [R. T. 152-54, 169]. The statement relating to registration in Alaska is to be compared with Exhibit 11, which proves that no such registration was made or obtained.

ARGUMENT

A.

THE PROSECUTOR'S OPENING STATEMENT DID NOT CONSTITUTE REVERSIBLE ERROR.

At page 46 of the Reporter's Transcript, the following appears:

"MR. MORROW: . . . Our next witness is Mr. Emmett Cochran, an employee of the State Prison System, a record keeper at Ithaca State Prison in New York.

"MR. OLLESTAD: Your Honor, wait a minute. I object to any of this evidence. And I object to the statement. I move for a mistrial at this time.

"THE COURT: The objection is sustained, but the motion is denied.

"Ladies and Gentlemen of the jury, you are instructed to disregard the statement of counsel in this connection. It is just as though it never had

been said. Completely disregard it . . . ."

At pages 50 and 98 of the Reporter's Transcript there appear offers of proof as to the matters sought to be proved by calling Mr. Cochran and similar records keepers -- (1) prior similar convictions, and (2) that Carlino is not the real name of the appellant.

The point raised on appeal is that the statement was prejudicial. There is no demonstration as to how the statement was prejudicial. If anything, the objection was made too soon for anything which might be considered objectionable to have been said.

It is submitted that the matters sought to be proved were entirely proper. Convictions for prior similar acts are admissible to show intent and identity. Nye & Nissen v. United States, 336 U.S. 618 (1949); Whaley v. United States, 324 F.2d 356 (9th Cir. 1963), cert. denied 376 U.S. 911 (1964); Henderson v. United States, 143 F.2d 681 (9th Cir. 1944).

Appellant in his brief offers the argument that "where proof of the commission of the offense charged carries with it the evident implication of criminal intent, evidence of the perpetration of other like offenses is inadmissible, . . ." [Appellant's Opening Brief, p. 1]. This Court has specifically ruled on said question. Even though intent may be inferred, "that fact does not prevent adding assurance of conviction with the proof of intent". Henderson, id., at 683. As a fleeting reading of the Reporter's Transcript shows, the only issue was the intent of appellant at the time of the subject

transportation.

Appellant alleges that no warning was given the trial court, and impliedly, the defense,of the Government's intent to introduce such evidence. The Government's Trial Memorandum, at C. T. 24, clearly shows that the trial court was informed of the matter. There would have been no point in stating the relative conviction record if it were only intended to be used for impeachment. The Reporter's Transcript, at page 52, shows that defense counsel knew of the convictions three weeks prior to trial. If defense counsel were truly concerned about the problem he could have asked for a hearing outside the hearing of the jury. From the absence of such a request, and in light of the knowledge of all parties, it was reasonable to assume that there would be no opposition to the introduction of such evidence.

B.

VENUE WAS PROVED

Appellant argues that the subject automobile must have been stolen when he left the State of California. No authority is cited for such proposition and it is noted that Riley v. United States, 359 F. 2d 850 (5th Cir. 1966), only requires that some transportation must have taken place within the District. Assuming, though, that it must have been stolen when removed from California, the evidence shows that appellant intended to steal it at the time of the rental. Appellant makes the invalid argument that he had two days of travel,

under the terms of the contract, in which the automobile could not be a stolen vehicle. If appellant intended to steal the vehicle at the time he rented it he was guilty of larceny by trick, and any subsequent interstate transportation would be a violation of the Dyer Act. United States v. Welborn, 322 F. 2d 910 (4th Cir. 1963); United States v. Turley, 352 U. S. 407 (1957). As appellant points out in his Opening Brief, at page 7, it is "realistic to assume that he would leave the state immediately and put as much distance as possible between himself and Los Angeles before the rental company became aware of its loss than to assume he would wait until the contract expired before absconding". Appellant is simply wrong in his interpretation that there could have been a two-day lapse before the vehicle would have become "stolen".

The Reporter's Transcript is replete with evidence that appellant intended to convert the automobile to his own use at all times since it came into his possession. There is evidence of statements of ownership by appellant, and his attempts to obtain and the actual obtaining of fraudulent license plates.

C.

THE TRIAL COURT DID NOT ERR IN ITS CHARGE TO THE JURY WITH RESPECT TO EXCULPATORY STATEMENTS LATER SHOWN FALSE AND THE POINT WAS NOT PRESERVED FOR REVIEW.

Rule 30, of the Federal Rules of Criminal Procedure, in part, states:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection . . . ."

There is nothing in the record, and appellant cites nothing in his brief, that is such an objection. It is true that there was a stipulation that objections made prior to the charge would be deemed made after, but there was no proper objection to the subject instruction at any time. At pages 218-19 there is a discussion of the subject instruction, but no objection thereto.

Appellant takes exception to the giving of the standard instruction in the area, but not the proposition of law stated therein. The grounds for exception are stated as "defendant's exculpatory statements had not been proven false, and the trial court gave an instruction not warranted by the evidence (Opening Brief, p. 10). The instruction, as given by the trial court, is found at page 278 of the Reporter's Transcript. The instruction does not say the statements were false, but states if proven false then they may be considered as evidence pointing to a consciousness of guilt. As triers of the facts, it is the jury's duty to determine whether the statements were false. Appellant's argument is directed to whether or not they were in fact false, an argument better directed to the jury, and not this Court.

In any event, the instruction did not exceed the evidence. There were several statements made by appellant which were

proven false. He stated he made a $225 deposit on the car [R. T. 132-35]. He said there was no limitation on the time he was to have the car [R. T. 132-35]. He said he made a deposit of $275 on the car [R. T. 152-53]. He stated he registered the car in Alaska in 1966 [R. T. 154]. He stated he did not attempt to obtain Tennessee plates for the subject vehicle [R. T. 169].

The above statements were rebutted by competent evidence. The rental contract, Exhibit 1, proves that only a $50 deposit was made. The rental contract proves a two-day limitation on the time appellant was allowed to have the car. Exhibit 11 proves that appellant did not register the vehicle in Alaska. The testimony of Mr. Treece proves that appellant did attempt to obtain Tennessee plates for the car [R. T. 102].

D.

APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE TRIAL COURT'S NOT SENDING DEFENSE COUNSEL TO ALASKA.

Appellant, in his opening brief, assumes that his trial counsel was ordered not to go to Alaska and Nevada at Government expense. The assumption is ill founded. At one point in the pre-trial proceedings the trial court told appellant's trial counsel that he could go to Alaska. The record as it now stands is void of such proof. The record will be supplemented to provide such proof.

Whether or not appellant's trial counsel was allowed to go to

Alaska, there is no authority for such an expenditure. The Federal Rules of Criminal Procedure make no provision for such a trip, and the Criminal Justice Act makes no such trip available.

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

No. 21,902

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MACMILLAN RING-FREE OIL CO., INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 19-67,

[1] Pertinent provisions of the Act are set forth in Appendix A, *infra,* pp. 46-48.

106-107),[2] issued against respondent on September 2, 1966. The Board's decision and order are reported at 160 NLRB No. 70. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Signal Hill, California, where respondent is engaged in refining and marketing petroleum products. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to negotiate in good faith with the certified bargaining representative of its production and maintenance employees.[3] The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by denying and withholding vacation pay due four striking employees, thereby discriminating against them because they engaged in a union activity. The facts on which the Board based its findings are summarized below.

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[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "R. Exh." and "G.C. Exh." are to exhibits of respondent and the General Counsel, respectively.

[3] Oil, Chemical and Atomic Workers International Union, AFL-CIO and Long Beach Local No. 1-128 (hereinafter collectively referred to as the "Union").

A. *Background—The 1960 contract*

On July 21, 1960, the International Union was certified as the exclusive bargaining agent of the Company's production and maintenance employees (R. 21; Tr. 51, G.C. Exh. 2).[4] Thereafter, on November 18, 1960, the International Union, together with Local 1-128, entered into a collective bargaining agreement with the Company (R. 21; Tr. 51, 585, G.C. Exh. 3(c)). The agreement (G.C. Exh. 3(c)), *inter alia*, provided that the Company recognized the Union as the exclusive bargaining representative of its employees in an appropriate unit (Art. I); prescribed wages, hours of work, and other terms and conditions of employment for such employees; required membership in the International as a condition of employment and provided a checkoff of union dues (Arts. III and IV); prohibited strikes, work stoppages, and lockouts for the duration of the contract subject to compliance with the terms of the contract and that employees would not be required to work "under unsafe conditions" (Art. XXV); and provided grievance and arbitration procedures (Art. XI). The contract was to remain in effect until October 31, 1961, "and from year to year thereafter" subject to prescribed notice provisions for amendment or termination; permitted each party to reopen the wage provisions by serving a prescribed 60-day written notice upon the other; and provided that the

[4] On April 7, 1961, the International Union was also certified as the exclusive bargaining agent of the Company's sales drivers and plant clericals (G.C. Exh. 2).

contract would "terminate" if no wage agreement was reached within the 60 days, unless the parties agreed to extend the contract "for a specific period for the purpose of continuing negotiations" (Art. II).

The Union reopened the wage provisions with the requisite notice in December 1960 (R. 21; Tr. 52, 580). This led to wage discussions, but no agreement was reached within the prescribed 60 days (R. 21; Tr. 580-581).[5] To avoid termination of the contract under its reopener provisions, the parties agreed to keep it in force subject to a right by either party to terminate it on 72 hours' notice (R. 21; Tr. 580-581). As of March 8, 1961, the parties were still in disagreement. On that date, the Union gave the Company the prescribed notice of termination (*ibid.*). On the evening of Friday, March 10, however, the parties agreed that a "status quo condition" would be maintained over the weekend pending a negotiating meeting scheduled for the following Monday (R. 22; Tr. 874, 577-578). That same evening, the Company "brought in additional trucks to haul out the finished products . . ." (R. 22; Tr. 579, 583). The Union took that to be a breach by the Company of the status quo commitment, and as a result, a work stoppage began instead on Friday night after about

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[5] The Company was represented by Henry W. Becker, a labor relations consultant, and management personnel (R. 21; Tr. 55, 872, 880). The Union was represented by George Cody, an official of the International, and by a committee of employees (R. 21; Tr. 54). Throughout all subsequent negotiations, Becker and Cody were the chief spokesmen for their respective sides (R. 21; Tr. 54-55, 872-873).

15 minutes' advance notice to the Company (R. 22; Tr. 603-605). According to Superintendent Bruce May, this procedure resulted in a loss of about $1000 worth of products (*ibid.*). About Monday, March 13, the parties reached agreement on a wage increase which was incorporated as an addendum to the 1960 contract (R. 22; Tr. 53, 874-875, G.C. Exh. 3(d)). That same day, the employees returned to work (R. 22; Tr. 875).

About a month later a dispute arose over the wage rate paid an employee and "two other items" not explicated in the record (R. 23; Tr. 877, 68). A strike was called for April 28, 1961, with the Company receiving about an hour's advance notice (R. 23; Tr. 580, 607). Company representative Becker reminded a business agent of the Local, Robert Brown, of the contractual prohibition of strikes and suggested the use of the grievance machinery (R. 23; Tr. 879). Brown replied that he had done what he could to defer the strike and would do so again if the Company raised the wage rate of the employee in question (*ibid.*). Becker stated that he could not agree without knowledge of the type of work the employee was performing (*ibid.*). Consequently, the strike followed shortly thereafter and continued until mid-June 1961 (R. 23-24; Tr. 608-609, 880). The parties executed a "strike settlement agreement," dated June 13, 1961, which provided, *inter alia*, that the contract of November 18, 1960, as amended, was "mutually terminated," and that the parties "meet as quickly as possible for the purpose of negotiating a new labor agreement" (R. 24; G.C. Exh. 3(e)).

Thereafter, the parties met 22 times for the discussion of contract terms prior to the commencement of a strike on September 8, 1964. In addition, there were 10 negotiating meetings during the strike, the last on April 2, 1965 (R. 24; Tr. 54).

B. *The Company's contract proposal of July 27, 1961*

Three negotiating meetings were held on June 22 and 28 and July 20, 1961, at which the Union proposed that the parties re-adopt the 1960 contract with the addition that employees with 20 or more years of service be given a fourth week of paid vacation instead of 3 weeks allowed under the 1960 contract (R. 24-25; Tr. 63-64, 66, 312). At the fourth meeting, on July 27, 1961, the Company submitted a proposed contract (R. 25; G.C. Exh. 3(f), Tr. 63, 67, 889). The proposal included, at least in substance, 14 of the 28 articles of the 1960 contract, together with 13 articles which were almost entirely new (R. 25). The clauses retained included those which recognized the Union as bargaining representative, afforded employment rights following military service, and granted leaves of absence for sickness, jury duty, and a death in the family.[6] The benefits thus afforded were apparently available in the absence of contract, either as a matter of law or as a matter of Company practice (see G.C. Exh. 3(bb), Art. XIV, at p. 9).

The changes and deletions fell into several categories. One group modified existing provisions to the employee's detriment. These reduced the notice due

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[6] Articles I, XVII, XVIII, XIX, XX.

employees before a schedule change from 48 to 24 hours; provided shift differential pay only for work performed after 6:00 p.m., rather than 4:30 p.m.; and eliminated premium pay for straight-time work performed on an employee's scheduled day off.[7] Another group allowed the Company to take adverse personnel actions in the future. Thus, new provisions established a list of 35 "rule infractions" as "sufficient grounds" for discipline, including "immediate discharge," depending on the seriousness of the offense in the judgment of management; allowed the Company to alter or add to the list to any extent not in conflict with other terms of the contract; and vested "sole discretion" in management "to maintain discipline among its employees." [8] Others of this sort vested "sole" discretion in management to subcontract work—even though it resulted in layoffs, demotions, or reduction of work hours—and to determine relative employee qualifications in applying seniority provisions, hence, in effect, giving it absolute authority in this area.[9] Still another group directly affected the Union's status and function by eliminating the union-shop provision requiring new employees to join the Union and substituting a "maintenance of membership provision" which required only that old employees retain that membership; by eliminating the checkoff of union dues; by eliminating compensation for employees on certain union business and re-

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[7] Articles V (Sec. 5, 6) and VIII.

[8] R. 25; G.C. Exh. 3(f), Art. XV, XXV, Appendix "B."

[9] Articles XI and XIV.

stricting leaves of absence for union business; by significantly reducing the time allotted to the Union to take various grievance steps; and by requiring management approval of all material posted on the plant bulletin board provided for the Union under the 1960 agreement.[10] Finally, another group of provisions dealt with strikes. These changes, in effect, prohibited work stoppages even though the Company was in breach of the contract or was requiring employees to work under unsafe conditions; vested "sole discretion" in management to discharge or otherwise discipline employees who engaged in work stoppages; and obligated the Union to make a public declaration in the event of a "wildcat strike" that the walkout was unauthorized and that its members should cross any picket line.[11]

During bargaining, Company representative Becker offered various reasons for the Company's proposed departures from the 1960 contract provisions. He said that "irresponsibility" by the Union in calling strikes was the reason for the maintenance of membership provision in lieu of the "union shop" and checkoff clauses (R. 26; Tr. 890-891, 74); and that the "management rights" provisions would give the Company added protection in the light of "recent Supreme Court decisions" (R. 26; Tr. 103). Becker said that the Company needed the list of "rule infractions" to give it better control over the employees (R. 26; Tr. 96); asserted that the proposed reduction

[10] Articles III, X, XII, XIII.

[11] Articles XXIV and XXV.

in time allotted the Union for grievance-processing steps would result in speedier dispositions (R. 26; Tr. 85); stated that the Company sought control over the Union's bulletin board at the plant because "profane and scurrilous" material had appeared on it after the 1961 strike (R. 26-27; Tr. 93, 818-819); and expressed the view that the Company "should not" pay for time spent by employees in processing grievances (R. 27; Tr. 104). Additionally, Becker said that the provision removing all limitations on subcontracting was sought in the interest of efficient operations (R. 27; Tr. 95-96); that eliminating the payment of a shift differential to day shift employees for work after 4:30 p.m. would prevent "overtime on overtime," (R. 27; Tr. 929, 82-83); and that the altered seniority provisions would promote efficiency (R. 27; Tr. 88).

C. *The Union's contract proposal of September 19, 1962*

As of the twelfth meeting, held on September 19, 1962, the parties were in disagreement on all the departures from the 1960 contract. At this meeting, the Union proposed a contract (G.C. Exh. 3(g)) which substantially incorporated all the terms of the 1960 contract (R. 27). The few modifications included the vacation benefit previously proposed by the Union (R. 27; Tr. 80-81, 108B); an increase in the permissible amount of accumulated sick leave from 45 to 60 days (R. 27; Tr. 108C-109); the inclusion of a clause in the "Maintenance of Existing Benefits" article providing for the continuation of a pension plan with the expectation that one would

be provided (R. 27; Tr. 110, 101); a provision for 2 weeks' severance pay for employees laid off after 1 year of service (R. 27; Tr. 110); a provision for time and one-half for the sixth and seventh consecutive days of work (R. 27; Tr. 108B); and a pay scale that would increase the hourly rates then in effect by about 6 percent (R. 27; G.C. Exh. 3(g), appended list of present and proposed hourly wage rates).[12]

D. *The rift deepens—the Company's contract proposal of October 18, 1962*

The differences between the Union and the Company over the departures in the Company's proposal of July 27, 1961, from the 1960 contract not only continued after the submission of the Union's written proposal, but were deepened by another draft of a proposed contract (G.C. Exh. 3(h)) submitted by the Company at the next meeting, held on October 18, 1962 (R. 27; Tr. 111). Most of the terms of the Company's second proposal were either identical to, or in material substance the same as, those of its first proposal. The second proposal set out with greater specificity the rights reserved to management; omitted language contained in the Company's previously proposed grievance and arbitration article that discharge or disciplinary action "shall be only for just cause"; included a provision not previously proposed that "where arbitration is sought and the

[12] In subsequent negotiations, the Union dropped its proposals for severance pay and increased sick-leave accumulation (R. 27; Tr. 100-101).

Company claims the matter is not subject to the arbitration provisions of this Agreement, then the matter of arbitrability shall first be decided by a court of law"; and substituted "open shop" provisions for the maintenance-of-membership article of the Company's first contract proposal.[13]

Either at the meeting of October 18, 1962, or the one that followed, Becker told the Union's representatives that while the Company had previously been willing to agree to "some type of union security" and had thus proposed the maintenance-of-membership clause in lieu of the 1960 union shop provisions, because of various "incidents" that had occurred in the plant in 1961 following the strike settlement agreement, management had decided that it had been "too liberal" in proposing the maintenance-of-membership provisions, and that the relevant proposal should be withdrawn to "reduce this authority of the Local over the employees" (R. 28; Tr. 893).[14]

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[13] Articles III, X, XXV.

[14] Becker testified that he received reports in July and September 1961 of incidents that occurred at the plant after the 1961 strike (R. 28; Tr. 886-887, 883). He said that he received reports that needles 2½ inches in length had been placed on an office chair usually used by Harold Dillard, then plant manager, and had caused the refinery superintendent, Bruce May, "a sharp pain" when he sat on the chair (R. 28; Tr. 884, 610, R. Exh. 9); that "somebody" had thrown "a caustic acid" in the shoes of an employee and another employee "had tar poured into his boots" (R. 28; Tr. 884); that lockers had been ransacked and pants left in lockers by non-strikers had been cut (*ibid.*); and that acid had been placed on, and had eroded, "a rope to a bosun chair" (R. 28; Tr. 612, 883-884). There is no evidence that the Union or any of its members was re-

E. *The Union accepts a wage increase*

At the fourteenth meeting, held on January 2, 1963, the Company made a proposal to increase the wages of the unit employees by 5 percent or, in the alternative, to establish a pension (R. 29; Tr. 117, 898). The offer was submitted in writing (G.C. Exh. 3(i)). Following approval by the employees, the Union agreed to accept the 5 percent increase in the form of wages, and an accord to that effect was signed by the parties (R. 29; G.C. Exh. 3(k), Tr. 118, 783, 898). The agreed terms also provided that "wages and pensions shall not be a matter of negotiation until such future time as the Union shall open industry-wide negotiations on wages, hours, working conditions, etc., with the oil industry after settlement of its present negotiations with the oil industry" (R. 29; G.C. Exh. 3(k)).

F. *From December 13, 1963, to May 7, 1964, the Company fails to schedule negotiation meetings—meanwhile, the Company initiates increased vacation benefits and the Union takes a strike vote*

There were five more meetings in 1963, but no agreement was reached on any of the subjects in controversy (R. 29; Tr. 122). At the last meeting in 1963, held on December 13, Cody asked Becker if he was prepared to submit a "final proposal" (R. 29; Tr. 122-123). Becker replied that he was not ready to do so at that point—that it would require

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sponsible for any of the incidents as the record does not identify any person responsible (R. 28).

some time to prepare one—but that he would communicate with the Union "right after Christmas" to arrange a meeting (R. 29; Tr. 123).

Meanwhile, on or about February 27, 1964, the Company proposed an increased vacation benefit.[15] The proposal was not made at a negotiation meeting, but by a letter from the Company to Union representative Cody with a copy to each employee in the bargaining unit (R. 30; G.C. Exh. 3(1), Tr. 124-125, 900). The letter stated that the Company was granting "all MacMillan employees" with 20 or more years of service 4 weeks of paid vacation; that unless the Company heard to the contrary, it would assume that the change in benefits met with Cody's approval; and that if he did not wish the benefit to be granted, he should advise the Company, which was willing to discuss the matter (R. 30; G.C. Exh. 3(1)). Upon receipt of the letter the following day, Cody telephoned a Company vice president, Earle Willoughby, and told him that the matter would be submitted to a meeting of employees, and that a "signed letter of agreement" would be necessary (R. 30; Tr. 126). The Company prepared such a letter on March 2, 1964, and its terms became an agreement upon execution by the International on the following day (R. 30; Tr. 126, G.C. Exh. 3(m)).

At a Union meeting in February 1964, all but one employee present voted in favor of a strike to support the Union's contract demands. The date of the strike

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[15] The proposal was similar to that proposed by the Union at the first negotiation meeting on June 22, 1961 (R. 24-25).

was left to the discretion of the negotiating committee (R. 30; Tr. 168-170, 482).

By March 18, 1964, Cody still had not heard from Becker regarding the meeting which Becker said he would arrange "right after Christmas" (R. 30). On that date, Cody wrote Willoughby and proposed that the parties enter into an agreement incorporating the terms of the 1960 contract and the additional vacation benefit (R. 30; G.C. Exh. 3(n)). Additionally, Cody requested the negotiation of a pension plan, an outline of which was enclosed (G.C. Exh. 3(o)), and requested Willoughby to communicate with him regarding arrangements for the resumption of negotiations (R. 30; G.C. Exh. 3(n)). Willoughby replied by letter of March 30, 1964, stating that the Company was endeavoring to secure information regarding the pension plan material submitted and that he would communicate with Cody to arrange for a meeting; and that in the future, matters pertaining to negotiations be taken up with Becker (R. 30; G.C. Exh. 3(p)).

By the latter part of April 1964, the Company still had not contacted the Union to arrange a meeting. Cody then called Becker and requested a meeting; Becker agreed to meet on May 7, 1964 (R. 31; Tr. 129-130).

G. *Negotiations resume—the Union sets a strike date—the Company offers its "final proposal"*

The May 7 meeting was held as scheduled and was devoted primarily to the Union's proposal for

a pension plan. The Union described the International's current oil industry "bargaining policy" which sought an increase in economic benefits amounting to 5 percent of wages, and informed the Company that the represented employees wished to use the 5 percent for the purchase of a pension plan (R. 31; Tr. 323-324, 832-834, 904-906). A Union representative gave a detailed explanation of the proposed pension plan (R. 31; Tr. 131, 784, 907).[16] Becker said the Company would take the plan under consideration and Cody agreed to defer negotiations until after a settlement in industry-wide negotiations (R. 31; Tr. 131, 785-786, 908).

In early August, Cody called Becker to set up another negotiation meeting (R. 32; Tr. 132). A meeting was set for August 20, but Becker requested a postponement to September 2 because he had not yet received some pension material which he had requested from a firm specializing in such matters (R. 31; Tr. 910-911, 838-840). In the course of this conversation, Cody told Becker that "the [industry] pattern had not been set as yet" but that he was "quite busy in negotiations with other companies" (R. 32; Tr. 331).[17]

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[16] Becker requested a printed copy of the proposed pension plan but none had been received as of the time of the hearing (R. 31; Tr. 907).

[17] By September 2, 1964, the date set for the next meeting, such negotiations had resulted in agreement between the International and various companies to increase economic benefits of employees by an amount equal to 4½ percent of their wages (R. 33; Tr. 333-334, 490).

On the morning of September 2, 1964, shortly before the scheduled meeting which was to be the twenty-first in the contract negotiations, the Union's negotiating committee discussed the question of calling a strike (R. 33; Tr. 170-172). Cody told them that he had not yet received the Company's contract proposal promised by Becker at the December 13, 1963, meeting and that matters ought to be brought "to a head" (R. 33; Tr. 172). The committee decided to strike, beginning September 8, 1964, if no adequate progress was made in negotiations (R. 33; Tr. 172, 483-484, 540).

Shortly after the September 2 negotiation meeting opened, Becker made an economic offer which, in ultimate amount, would follow "the industry pattern" (R. 33; Tr. 135). It was disputed whether the offered 4½ percent increase was applicable solely to a pension plan, as claimed by the Union (R. 33; Tr. 144-145, 470, 490-491), or whether the amount could be applied to either a pension plan or a wage increase, as claimed by the Company (R. 33; Tr. 789, 911).[18] In any event, Becker gave Cody a printed copy of the proposed pension plan (R. 33; Tr. 135). In response to an inquiry by Cody, Becker said that the plan was the same as that turned down by the Union in 1963 (R. 33; Tr. 468, 516). After some discussion about the Union's pension proposal, Cody said that

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[18] This dispute is no longer of any particular relevance. A charge which alleged that the Company misrepresented to the employees the conduct of the Union's negotiating representatives was dismissed (R. 34-36).

the Company's proposal was not acceptable (R. 33; Tr. 516, 790).

Following the discussion about the pension plan, Cody asked Becker for the "final proposal" which the latter had promised at the December 13, 1963, meeting (R. 33; Tr. 136). Becker gave Cody a draft of a contract which, with a few relatively minor exceptions, was the same as the Company's contract proposal of October 18, 1962 (R. 33-34; Tr. 136, 790, G.C. Exh. 3(q)). After an examination of the draft, Cody said that it was as bad as, or worse than, the Company's last proposal (R. 34; Tr. 516, 536-537). He told Becker that unless the parties reached an agreement by the morning of September 8, embodying a pension plan and the terms of the 1960 contract, that the Union would take "economic action" against the Company or, in other words, call a strike (R. 34; Tr. 146). At this point Becker asked Cody, "Haven't you had enough yet?" or words to that effect (R. 34; Tr. 912, 136, 335, 470, 516-517, 534, 843). Cody requested that negotiations continue, but Becker declined, stating that he had to make arrangements for the continued operation of the plant (R. 34; Tr. 136-137, 335, 470, 517, 534, 913).

On September 6, 1964, at a meeting of 25 of the 31 employees then in the unit, one of the Union's bargaining representatives read the "minutes" of the last three meetings with the Company and portions of the Company's proposed contract, reported the strike warning that had been given the Company, and answered questions "regarding the possible

strike and the negotiations" (R. 36-37; Tr. 346-347, 462, 480-482). One employee suggested another strike vote because there were two "new employees" who had not participated in the previous strike vote, but several other employees said that that was not necessary, and that the impending strike was "legal" (R. 37; Tr. 461-462). Accordingly, the strike commenced, as scheduled, on September 8, 1964, and was continuing at the time of the hearing in November 1965 (Tr. 54).

H. *Post-strike negotiations—the Company's new strike-prohibition proposal*

On November 4, 1964, Becker wired the Union requesting a meeting to discuss putting a 4½ percent wage increase into effect (R. 37; Tr. 172-173, 349, 921, G.C. Exh. 3(u)). As a result, a meeting was held on November 6, 1964, in the presence of a Federal mediator (R. 37; Tr. 921). Becker said that the Company wished to put a 4½ percent wage increase into effect (R. 37; Tr. 174, 921). Cody indicated that the proposal was acceptable provided an agreement could be reached on the contract terms in dispute (R. 37; Tr. 174, 349, 797) and added that the Union wished to negotiate the other matters (R. 37; Tr. 921-922). Becker declined, stating that an agenda for other matters should be set up for a future meeting, but that he was only prepared to discuss the wage proposal at that time (R. 37; Tr. 179, 350-351, 922).

The negotiators next met on December 4, 1964 (R. 38; Tr. 436). By prior arrangement, the Union

submitted to the Company a list of items still in dispute (R. 38; G.C. Exh. 3(w), Tr. 429-432, 435-436). Each item on the list was discussed, but no progress toward agreement was made (R. 38; Tr. 801, 939). There was only one change of position at the meeting. Becker proposed that a paragraph be added to the strike prohibition and related requirements set forth in the Company's proposals of October 18, 1962, and September 2, 1964 (G.C. Exh. 3(x), which reads as follows:

> The Union agrees that any time a strike, work stoppage, or interruption of work or other concerted activity occurs by the employees covered hereunder during the term of this Agreement or within one (1) year from its termination, the Union shall pay each striking employee eight (8) hours per day and forty (40) hours per week at his then hourly wage rate for all the time he is on strike, including time and one-half (1½) for all hours spent picketing in excess of eight (8) hours per day and forty (40) hours per week with double (2) time for Sunday and holiday picketing.

In submitting the addition, Becker expressed the hope that it "would prevent future strikes" (R. 38; Tr. 941, 184). Cody rejected the proposal stating that he knew of no union in the United States that would agree to it (*ibid.*).

Toward the end of the December 4 meeting, Cody expressed the willingness to meet the following day or any other day or night in an effort to reach a settlement, but Becker said that he would be away

until December 18, and could not meet again until after the coming holiday period (R. 38; Tr. 182-183). Becker said that he would call Cody upon his return to arrange a meeting (R. 38; Tr. 183, 354-355, 802). On January 6, 1965 Cody wrote Becker requesting a meeting (R. 38; G.C. Exh. 3(y), Tr. 939, 189). Becker answered by letter of January 8, 1965 (G.C. Exh. 3(z)) and agreed to meet on January 12.

Meetings were held on January 12, 21, and 28, 1965, at which the parties basically reiterated views and proposals previously advanced (R. 39; Tr. 194-195).

I. *The Union's contract proposal of March 1, 1965—the negotiations come to a fruitless end*

At a meeting held on March 1, 1965, with a Federal mediator in attendance, the Union submitted a new draft of a contract proposal (R. 39; G.C. Exh. 3(aa), Tr. 809, 991). The Union offered to agree to either the terms of the offered proposal or, in the alternative, to the terms of the Union's contract proposal of September 19, 1962 (R. 39; Tr. 200, 213-214). The new draft incorporated most of the terms of the Union's 1962 proposal, differing from the latter in that it omitted the wage reopener provisions, providing as a substitute a 3-year term with step increases for each employee totalling 22 cents an hour (R. 39; Tr. 201, 269); provided for a pension fund contribution by the Company of 15 cents per working hour for each employee affected (Tr. 201); set forth a two-step grievance and arbitration procedure patterned after a contract between MacMillan

and the Teamsters (R. 39; Tr. 209); and provided an upward revision of paid vacation benefits (R. 39; Tr. 207). Becker said that he would take the new proposal under consideration (R. 39; Tr. 200, 809).

At the next meeting, March 18, 1965, Becker rejected the Union's latest contract proposal, saying that it was substantially the same as "the old contract" and that it would increase "economic costs" for the Company (R. 39; Tr. 994, 213-214). Each article of the proposal was discussed, but the parties could not agree to any of the new terms (Tr. 994, 809), except that the Union abandoned its proposal for 60 days of sick leave and agreed to the 45-day provision previously in effect (R. 39; Tr. 211, 1009).

The final meeting was held on April 2, 1965, upon arrangements by the mediator (R. 39; Tr. 1014, 1023). No accord was reached on any of the matters in dispute, most of which had been in dispute for almost 4 years (R. 39; Tr. 215).

J. *The Company unlawfully withholds vacation benefits from four striking employees*

Company employees Forest R. Bumgarner, Leslie E. Omo, James R. Northrop, and Stuart H. Wakefield participated in the strike which commenced on September 8, 1964 (R. 60; Tr. 441, 451, 457). As of December 1964, they had neither received vacations in 1964 nor had been given vacation pay in lieu thereof (R. 60).[19] Wakefield had been scheduled to

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[19] The vacation article of the 1960 contract provided that "newly hired employees shall, upon completion of their first

take 2 weeks' vacation beginning September 10, 1964 (R. 60; Tr. 443-444).

At the meeting of December 4, 1964, Becker was asked when the employees who had earned, but had not received, vacation pay would be paid. Becker said that he would look into the matter (R. 60; Tr. 184-185). A few days later, Cody made a similar inquiry of Willoughby and the latter assured Cody that the men would be paid what was due them (R. 60; Tr. 186-187, 353, 802-803). About a week later, Cody telephoned Willoughby about the matter. Willoughby stated that while the Company "did not deny that [the four men] had earned the vacation pay," the Company "had a policy of not paying personnel in lieu of vacation," and "felt they were not entitled to it unless they returned to work, or until they resigned from the company" (R. 60; Tr. 803, 353-354, 188).

In the latter part of 1964, Wakefield filed a complaint with the California Department of Industrial Relations seeking payment of vacation pay claimed to be due (R. 60; Tr. 449-451). At a hearing before an official of that agency, Willoughby agreed that "these vacations were due" the men, but that "the vacations would not be paid until (sic) the duration of the strike" (R. 60; Tr. 453). Shortly thereafter, on or about July 15, 1965, the Company paid each of the four men the amount each claimed to be due him as vacation pay (R. 61; Tr. 457-458).

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year's service, take their pro rata vacation pay to January 1, so that January 1 will thereafter become their vacation anniversary" (R. 60; G.C. Exh. 3(c), Art. VIII).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to negotiate in good faith with the certified bargaining representative of its production and maintenance employees. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by denying and withholding vacation pay due four striking employees, thereby discriminating against them because they engaged in a union activity. Additionally, the Board found that the strike that began on September 8, 1964, was caused, and has been prolonged, by the Company's unfair labor practices (R. 64).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to bargain collectively with the Union, upon request, with respect to wages, hours, and other conditions of employment, and if agreement is reached to embody it in a signed contract; to reinstate, upon unconditional request, any employee who engaged in the strike that began on September 8, 1964,who has not yet been reinstated to his former or substantially equivalent position and, in the event of refusal by the Company to reinstate any such requesting employee, to make the employee whole, with interest, for loss of pay suffered by reason of such refusal; and to post appropriate notices (R. 65).

ARGUMENT

I. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(5) and (1) of the Act by Failing to Bargain in Good Faith

A. *The applicable standard*

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." "To bargain collectively" is defined by Section 8(d) as "the mutual obligation * * * to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * *." To be sure, neither party is obligated to yield to any or all demands of the other. But "there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement * * *." *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231 (C.A. 5). Indeed, as the Supreme Court said in restating the principles which guide decision in cases involving the bargaining duty imposed by the Act in *N.L.R.B.* v. *Insurance Agents' Union*, 361 U.S. 477, 485:

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, in which each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement to enter into a collective bargaining contract.

Similarly, this Court has stated that there exists a duty to enter into negotiations with "an unpretending, sincere intention and effort to arrive at an agreement [and] absence thereof constitutes an unfair labor practice." *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 380 (C.A. 9); *N.L.R.B.* v. *Mrs. Fay's Pies*, 341 F. 2d 489, 492 (C.A. 9); *N.L.R.B.* v. *Shannon*, 208 F. 2d 545, 548 (C.A. 9). While this duty does not require reaching an agreement, it does interdict "mere pretense at negotiation with a completely closed mind and without [a] spirit of cooperation and good faith . . . ." *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F. 2d 210, 215 (C.A. 8); *N.L.R.B.* v. *Shannon*, *supra*, 208 F. 2d at 548.

In judging whether the parties have fulfilled their statutory duty to confer in good faith "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement." *N.L.R.B.* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 498. That determination is made by "drawing inferences from the conduct of the parties as a whole." *Ibid.* It is one of "mixed fact and law, [and] a court will not lightly disregard the overall appraisal of the situation by the Labor Board 'as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' " *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1), cert. denied, 346 U.S.

887, quoting *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488.

B. *The bases for the Board's determination that the Company failed to bargain in good faith*

1. *Progressive injection into the negotiations of increasingly prohibitive proposals aimed at undermining the Union's representative capability and status*

As shown in the Statement, the Union has been the exclusive bargaining agent of the Company's production and maintenance employees since July 21, 1960, and on November 18, 1960, the Union and the Company entered into a collective bargaining agreement (G.C. Exh. 3(c)). By the terms of a "strike settlement agreement" of June 13, 1961, the 1960 contract was mutually terminated (G.C. Exh. 3(e)). Subsequent negotiations spanned almost 4 years and the parties met some 30 times, but no new agreement was reached. As the Board found, one of the principal causes of this fruitless end was the Company's tactic of increasingly restrictive proposals predictably unacceptable to the Union and forseeably productive of deadlock (R. 53-54).

As shown in the Statement, the Company's first counteroffer deprived the employees of some benefits and gave management authority to make further substantial changes to the employees' detriment, including reduction in hours, layoff, or discharge. The principal example was the provision for "rules infractions" which gave the Company the right to establish virtually any rule it wished and discharge any

employee who in management's judgment "violated" the rule. Under the original proposal, it was not clear whether the Company's decision in this respect was subject to arbitration, although the contract provisions for handling the related problem of seniority on layoff (*supra*, p. 7) and the wording of the management rights' clause (*supra*, p. 7) indicated that the Company's decision would be final. Shortly afterwards, however, the Company stated that it would not arbitrate these discharges and in its 1962 proposal the provision that discharge must be for "just cause" was deleted. Cf. *Vanderbilt Products, Inc.* v. *N.L.R.B.*, 297 F. 2d 833 (C.A. 2). Similarly, the Company opened by withdrawing agreement to a "union shop," and simultaneously making several other proposals which were, in effect, attacks on the Union's status. Later, the Company went further and withdrew its offer of a "maintenance of membership" clause and insisted on an "open shop." As a third example of this conduct, the Company began by seeking to prohibit all strikes, even eliminating the provision (grounded on Section 501 of the Act, *infra*, p. 48) that employees need not work under "unsafe conditions." After "bargaining," however, the Company came forward with a proposal that the Union pay employees full salary while they were on strike during the contract period and for a year afterward, although Becker conceded that "probably" no union had ever signed "anything like this" (Tr. 941-943).[20]

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[20] Becker testified that he expressly told Cody at the meeting of January 28, 1965, that the Company had withdrawn

In short, the Company's bargaining proposals were such that they did not have "the slightest chance of acceptance by a self-respecting union. . . ." *Reed & Prince Mfg. Co., supra,* 205 F. 2d at 139; *Vanderbilt Products, supra,* 297 F. 2d at 834. The Company recognized this and sought to justify its position, but its "explanations" only make the position less tenable. The Company's assertion (Tr. 943) that the strike-pay proposal was designed "to stimulate negotiations" is incredible on its face. The Company sought to explain its progressively harsher proposals during the course of negotiations as a reasonable reaction to the Union's failure to accept the Company's original offers (Tr. 1077-1078). Significantly, however, Becker sought to justify the harshest initial proposals of all —the provisions allowing "absolute employer right to discharge or lay off without restriction or seniority limitation" (*Vanderbilt Products, supra,* 297 F. 2d at 833)—on the basis of post-strike misconduct by unidentified persons (Tr. 934). The record shows, how-

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the proposal (Tr. 968-969). But previously, when asked about the manner of withdrawal, Becker testified, "Just a mental withdrawing of it . . . (Tr. 944). Becker changed his testimony following an overnight recess (R. 56). Cody was in effect corroborated by Company Vice President Willoughby who said that the proposal was never "referred to again by the Company" after the meeting of December 4, 1964 (Tr. 831). Accordingly, Cody was credited (R. 56). It is well settled that such credibility determinations are peculiarly within the province of the Board and the Trial Examiner, and should rarely be disturbed on review. *N.L.R.B.* v. *Local 776, IATSE,* 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B.* v. *Stanislaus Implement Co., supra,* 226 F. 2d at 381.

ever, that these proposals were advanced *before* he learned of these incidents (Tr. 934, 886-887). He also sought to attribute both the withdrawal of the "union shop" and the subsequent withdrawal of the "maintenance of membership" clause to this same cause, although he elsewhere conceded that the original change was proposed *before* he learned of the incidents and the second change was proposed over a year—and six bargaining sessions—*after* he learned of them (Tr. 885-886).

In the course of the negotiations, and under direct examination, Becker gave cost factors or considerations of efficiency or operational flexibility, as the case may be, for the provisions in its contract proposal of October 18, 1962, dealing with shift differential pay, notice of schedule changes, subcontracting, leaves of absence, vacations, and premium pay for work on a day off (*supra*, pp. 7-8). But under cross-examination, Becker took the position that "all" of the provisions of the Company's 1962 contract proposal were "influenced by the Union's irresponsible conduct," enlarging on this claim when asked about particular provisions (R. 51; Tr. 1044, 1046, 1054, 1063-1065). Willoughby contradicted Becker with testimony that the only proposals of the Company influenced by union conduct were the "union shop clause" and the "strike and lockout clause" (Tr. 847-848). Moreover, at the negotiating meeting of June 12, 1962, Cody asked Plant Superintendent Smock if he could function under the terms of the old agreement. Smock obtained Becker's permission

and replied, "I not only can, I have worked under the old agreement," at which point, Becker said that he was the Company's representative and that Smock had no right to answer the question (Tr. 217). That was Smock's third negotiating meeting and his last (G.C. Exh. 3(b)). Thus, with their falsity and self-contradictions, the Company's "explanations" fail to justify conduct which on its face was the antithesis of bargaining. Moreover, this vacillation in assigning reasons for its conduct is further evidence of the Company's bad faith. "Good faith bargaining necessarily requires that claims made by either bargainer be honest claims." *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152.

2. *The Company suddenly announces an increased vacation benefit*

The Company's bad faith is further evidenced by the manner in which it announced an added vacation benefit. As early as June 1961 the Union had proposed the added vacation benefit and the Company had taken the position that it could not afford it (Tr. 66). Almost 3 years after the initial proposal, without prior approval of the Union, the Company notified employees in the unit that it was putting the vacation benefit into effect (G.C. Exh. 3(l)).

The notification affords a revealing glimpse of the Company's attitude toward its bargaining responsibility. Not only was the announcement mailed to employees on the same day it was mailed to Cody, without prior arrangement with the Union, but there is not a word in the letter to suggest that the benefit

had been proposed by the Union. In fact, the impression left by the notice is that the added benefit was an act of grace by the Company. The announcement states that the Company "is continually striving to improve its employee program," that the benefit was "in furtherance of this policy," and that "all MacMillan employees" with the prescribed years of service would be given the added week's vacation (G.C. Exh. 3(l)). Finally, Cody was told that "should you not wish for MacMillan to grant this new employees' benefit, please advise us . . ." (*ibid.*). The fact that the added benefit was, upon Cody's request, subsequently embodied in a letter agreement (G.C. Exh. 3(m)) does not alter the underlying thrust of the "grant" and the manner of its announcement. There was little else the Union could do but agree, for it could hardly veto the "grant" of a benefit that it had been seeking for some years without incurring the displeasure of the employees. Under these circumstances, the Board reasonably found that the underlying purpose of the announcement was to project an image of the Company as the benefactor of "all" its employees, without regard to union representation, with a corresponding implication for the employees in the unit that their bargaining representative was ineffective. Commenting on almost identical employer conduct in *N.L.R.B.* v. *Generac Corp.*, 354 F. 2d 625, 628, the Seventh Circuit observed:

> This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining. It was

> fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees. It reflected on the alleged good faith of [the employer's] recognition of the Union as a bargaining agent.

See also, *Majure Transport Co.* v. *N.L.R.B.*, 198 F. 2d 735, 738 (C.A. 5); *N.L.R.B.* v. *Reed & Prince Mfg. Co., supra*, 205 F. 2d at 137-138.

3. *The Company's dilatory tactics*

The delaying tactics employed by the Company at various times throughout the negotiations is further evidence that the Company had no desire to reach agreement with the Union. When Cody asked Becker at the December 13, 1963, meeting if he was prepared to submit a "final proposal," Becker replied that he was not but that he would contact the Union right after Christmas to arrange a meeting. By March 18, 1964, Cody still had not heard from Becker regarding the promised meeting, so he wrote Company Vice-President Willoughby and requested resumption of negotiations (G.C. Exh. 3(n)). By letter of March 30, 1964, Willoughby told Cody that he would contact him to arrange a meeting as soon as the Company acquired some pension plan material (G.C. Exh. 3(p)). By the latter part of April 1964, the Company still had not contacted the Union to arrange a meeting. Cody again had to take the initiative in arranging a meeting, and he called Becker with the result that the parties finally agreed to meet. Thus, the meeting which Becker had prom-

ised to arrange "right after Christmas" was finally held on May 7, 1964, and then only upon the Union's initiative.

The "final proposal" requested by the Union at the meeting on December 13, 1963, was at last offered by the Company at the meeting on September 2, 1964, (G.C. Exh. 3(q)). The "final proposal," as it turned out, was substantially the same as the Company's 1962 proposal (G.C. Exh. 3(h)). No reason appears why it should take the Company so long to prepare a proposal which was virtually the same as a proposal previously offered. Moreover, when Cody warned of a possible strike because of the hard line taken in the Company's "final proposal," Becker replied, "Haven't you had enough yet?" (Tr. 912, 136, 335, 470, 516-517, 534, 843). It is reasonable to conclude that this was but a veiled intimation that the Company had thus far defeated the Union's efforts to conclude a new labor agreement and that more of the same was in store. It is well settled that the Act "does not permit an employer to secure . . . a dominant position at the bargaining table by means of unreasonable delay." *"M" System, Inc.*, 129 NLRB 527, 548-549. See also, *N.L.R.B.* v. *Exchange Parts Co.*, 339 F. 2d 829, 832-833 (C.A. 5); *N.L.R.B.* v. *W.R. Hall Distributor*, 341 F. 2d 359, 362 (C.A. 10); *N.L.R.B.* v. *Mrs. Fay's Pies, supra*, 341 F. 2d at 492.

4. *Summary*

As shown above, the record affords ample basis for the Board's finding that the Company did not meet its legal obligation to bargain with the Union in

good faith. The tactic employed was to keep as much of the 1960 contract as was favorable, but to propose significant changes aimed at destroying the Union's representative status. And, as time went by, the Company made new proposals even more restrictive and more objectionable to the Union. Even when the Company proposed an added benefit, as with the vacation benefit, it did so in a manner calculated to embarrass the Union and to discredit it in the eyes of the employees. Therefore, here as in *N.L.R.B.* v. *Mrs. Fay's Pies*, *supra*, 341 F. 2d at 492, the Board properly concluded that the "Company, with studied deliberation sought to subvert employee confidence in the Union's representation and determined to frustrate rather than promote, the quality of reasonably cooperative negotiation required by the law . . ." See, Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 Colum. L. Rev. 248, 258-265 (1964).[21]

C. *The Company's unfair labor practices caused and prolonged the strike that began on September 8, 1964*

There is no doubt that the strike was caused by the employees' frustration with the lengthy, fruitless,

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[21] Before the Board, the Company argued that it was the Union that was bargaining in bad faith because of its refusal to settle for something less than the 1960 contract. But, as the Trial Examiner points out, that argument misses the mark because the Board's finding is *not* that the Company's proposals were *per se* unlawful. The determination made is that the Union was seeking agreement on a new contract while the Company's aim was to undermine the Union by frustrating the bargaining process (R. 57-58).

negotiations. In February 1964, at a meeting of unit employees, all but one employee present voted to strike in support of the Union's contract demands. The Union's negotiating committee was authorized to determine the date of the strike. On September 2, 1964, the committee decided to call a strike commencing September 8, 1964, if no adequate progress was made in negotiations. The Union had been expecting the Company's "final proposal" since December 13, 1963. When it was finally tendered on September 2, 1964, and it was apparent that the Company was offering little or nothing more than they had in 1962, Cody informed the Company of the Union's intention to strike commencing September 8, 1964. Since the Company was not meeting its statutory obligation to bargain in good faith—and since the strike was an obvious result thereof—the Board properly found that it was an unfair labor practice strike. *Mrs. Fay's Pies, Inc.*, 145 NLRB 495, 496-497, enforced, 341 F. 2d 489 (C.A. 9). Accordingly, the strikers are entitled to reinstatement upon request. *Id.* at 509-510.

Before the Board, the Company argued that certain violence, threats, and intimidation by pickets following the start of the strike suspended its obligation to bargain. There is no merit in this contention. It is true that there was much evidence adduced at the hearings concerning acts of violence following this strike (R. 40-43). Without here reciting the numerous alleged acts of misconduct, suffice it to say that not one person holding a position with the Union

was credibly linked to any of the misconduct (R. 40, n. 17). As was the case with the 1961 strike, the serious acts of misconduct were committed by persons unknown. The Company's bargaining posture was established well before the alleged incidents surrounding the strike and could not have been influenced by them (R. 58-59). Moreover, should the Company's position be accepted, "it would mean that at the very point when an industrial controversy becomes most bitter and when the collective bargaining provisions of the Act should provide a peaceful means of settlement those provisions are cast aside and the employer is permitted to engage in unrestricted violation thereof." *Reed & Prince Mfg. Co.*, 12 NLRB 944, 971, enforced, 205 F. 2d 131 (C.A. 1).

D. *Section 10(b) of the Act is no bar to the Board's findings*

Before the Board, the Company strenuously objected to the admission of evidence concerning events that occurred more than 6 months prior to the filing of the charge with the Board.[22] The charge was filed on November 10, 1964 (G.C. Exh. 1(a)). Accordingly, all events occurring prior to May 10, 1964, would be affected by Section 10(b).

Section 10(b) was construed by the Supreme Court in *Local Lodge No. 1424, IAM* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411. The Supreme Court held

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[22] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

that "where occurrences within the six-month limitation period in and of themselves may constitute, as a substantive matter, unfair labor practices . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . ." *Bryan Mfg. Co.*, 362 U.S. at 416. Accord: *N.L.R.B.* v. *Strong*, —— F. 2d —— (C.A. 9, No. 20,762, decided July 14, 1967), 65 LRRM 3012, —— L.C. para. ——.

Here, there is ample evidence of events since May 10, 1964, upon which to base the Board's findings. The Company's proposal of September 2, 1964, when considered in the light of the previous negotiations, stands out as a beacon illuminating the Company's bargaining attitude. Not only was the proposal basically the same as that made by the Company in 1962, but the Company had delayed since December 13, 1963, on the premise that it would take time to reduce its "final proposal" to writing. Additionally, there is the Company's proposal of December 4, 1964, which would impose financial obligations on the Union in the event of an "unauthorized" strike (see p. 19, *supra*). As previously shown, this proposal was predictably inflammatory.

Although the background data in this case spans a considerable period of time, largely because of the nature of this case, the Board is entitled to consider it in evaluating what transpired within the 10(b) period. See cases cited p. 37, *supra*. Accordingly, the impact of the Company's September 2, 1964, contract proposal, and the other later events, must be considered in the light of the Company's past bar-

gaining practices. It is well settled that the Board is not required to consider events in isolation, separate and apart from reliable and probative evidence of their true meaning. *Sunshine Biscuits, Inc.*, v. *N.L.R.B.*, 274 F. 2d 738, 741 (C.A. 7).

E. ***The Trial Examiner's refusal to compel officials of the Federal Mediation and Conciliation Service to testify was not a denial of due process***

Federal Mediators Grant Haglund and Jules Medoff were present at six of the negotiating meetings from November 12, 1963, to January 12, 1965 (G.C. Exh. 3(b)).[23] The Company served subpenas on Haglund and Medoff, but the Trial Examiner granted the petition filed by the Federal Mediation and Conciliation Service to revoke the subpenas (Tr. 669, 636-675).

The Trial Examiner properly ruled that the mediators were protected by statutory privilege. Federal law provides that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." 5 U.S.C., Sec. 22, Rev. Stat., Sec. 161. Pursuant to the authority granted in 5 U.S.C., Sec. 22, the Secretary of Labor promulgated a regulation specifically prohibiting officers and employees of the Conciliation Service from testifying

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[23] They were also present at two other meetings that were not attended by Cody or Becker (R. 38; G.C. Exh. 3(b)).

in any case with respect to information coming to their knowledge in their official capacity (see *Tomlinson of High Point, Inc.*, 74 NLRB 681, 684 n. 8). The Conciliation Service subsequently was severed from the Department of Labor and the Federal Mediation and Conciliation Service was established. In so doing, however, Congress specifically provided that "such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor." 29 U.S.C., Sec. 172(d), 61 Stat. 153. The Federal Mediation and Conciliation Service has retained, in substance, the same regulation as that promulgated by the Secretary of Labor (see 29 C.F.R., Sec. 1401.5). The Trial Examiner reasonably interpreted 29 U.S.C., Sec. 172(d) as a savings clause and hence properly determined that Congress thereby intended the regulation concerning nondisclosure of information to remain effective (Tr. 665-666).[24]

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[24] It is settled law that these regulations are valid exercises of the executive power. *Touhy* v. *Ragen*, 340 U.S. 462; *Boske* v. *Comingore*, 177 U.S. 459; *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *Fleming* v. *Barnardi*, 1 F.R.D. 624, 625 (N.D. Ohio); *Steagall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.).

Effective July 4, 1967, the new "public information" section (Public Law 89-487, 80 Stat. 250, revising 5 U.S.C. 552, formerly section 3 of the Administrative Procedure Act) respecting disclosure by public officials, provides that it is not applicable, *inter alia*, to "(4) trade secrets and commercial or financial information obtained from any person and privileged or confidential . . . ." House Rept. 1497, 89th Cong., 2d Sess. p. 10, states: "This exemption would assure the confidentiality of . . . disclosures made in procedures such as the

Moreover, there is strong public policy for the regulation and, more important here, for the claim of privilege based on it. If mediators were permitted to testify about their activities, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. *Tomlinson of High Point, Inc.*, 74 NLRB 681, 685; *Int'l Furniture Co.*, 106 NLRB 127, 128 n. 2. The trust accorded mediators would, therefore, be seriously impaired. This loss of trust would be critical, for the Service may only *proffer* its good offices to the parties to an industrial dispute, and the statute creating the Service expressly provides: "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation." See 29 U.S.C., Secs. 171-173, 61 Stat. 154. Accordingly, the confidence of the parties is the Service's principal asset, and with the impairment of that confidence, the Service's ability to foster settlement of labor disputes through the mediators' promotion of collective bargaining would likewise be impaired, thus defeating the intent of Congress in creating the agency. We submit that this is a case in which the "necessity [urged in support of the subpena] is dubious, [and] a formal claim of privilege, made under the circumstances of this case, will have to prevail." *United*

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mediation of labor-management controversies." Although this statute was not in effect at the times relevant here, Congress thus indicated that it intended to preserve the confidentiality of matters related to the Service.

States v. *Reynolds*, 345 U.S. 1, 11. See also, *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A. D.C.); *Starr* v. *Commissioner of Internal Revenue*, 226 F. 2d 721, 723-724 (C.A. 7); *Madden* v. *Hod Carriers, etc., Local No. 41*, 277 F. 2d 688 (C.A. 7), cert. denied, 364 U.S. 863; *Kaiser Aluminum Co.* v. *United States*, 157 F. Supp. 939, 942 (Ct. Cl.). Cf. Rule 34, Federal Rules of Civil Procedure. As this Court recognized in *Harvey Aluminum (Incorporated)* v. *N.L.R.B.*, 335 F. 2d 749, 755, a valid claim of privilege justifies the Board's considering the evidence adduced without regard to what may have been excluded.

In any event, the respondent was not prejudiced in any way by the revocation of the subpenas. Of the occurrences during the six meetings attended by the mediators, only two matters of relative insignificance are in dispute. At the September 4, 1964, meeting, with mediator Jules Medoff in attendance, the parties could not agree as to the nature of an offer made by the Company at the previous meeting. The dispute concerned whether a 4½ percent increase offered by the Company was applicable only to a pension plan, as the Union representatives claimed, or whether the Union was given a choice of applying the 4½ percent increase to either a wage increase or a pension plan, as Willoughby and Becker claimed (R. 33; Tr. 144-145, 470, 490-491, 789, 911). The only significance of this dispute is its possible effect on the credibility of the parties. The Trial Examiner found that there was simply a good faith mis-

understanding (R. 35-36). It is difficult to see how respondent was prejudiced by this finding, or how the testimony of the mediator as to *his* understanding could alter the Examiner's conclusion.

At the only other meeting involved, Becker and Willoughby claimed that the Company made its "final proposal" at the December 13, 1963, meeting, the sense of their testimony being that it consisted of the Company's written proposal of October 18, 1962, with whatever changes had been made since (R. 29; Tr. 781, 903). Cody said that Becker told him that he was not yet ready to make a "final proposal," that it would take some time to prepare one, and that he would communicate with the Union "right after Chirstmas" to arrange a meeting (R. 29; Tr. 122-123). As the Trial Examiner found, if the Company in fact made its "final proposal" at that meeting, no reason appears why it should take so long to reduce to writing (Tr. 903). Thus, even assuming, *arguendo*, that the Trial Examiner erred by revoking the subpenas, the respondent was in no way prejudiced thereby. "Procedural irregularities are not *per se* prejudicial; each case must be determined on its individual facts and, if the errors are deemed to be minor and insubstantial, the administrative order should be enforced notwithstanding." *N.L.R.B.* v. *Seine and Line Fishermen's Union*, 374 F. 2d 974, 981 (C.A. 9), and cases cited therein.

II. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Denying and Withholding Vacation Pay From Striking Employees

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.[25] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.[26]

As shown in the Statement (pp. 21-22, *supra*), it is not disputed that vacation pay was withheld from four employees who participated in the strike that commenced on September 8, 1964. On two occasions, Cody checked with Company Vice-President Willoughby about the vacation pay and was assured that the men would be paid what was due them. However, Willoughby later told Cody while the Company "did not deny that [the four men] had earned the vacation pay," the Company "had a policy of not paying personnel in lieu of vacation," believing that "vacations were taken as a rest from work,"

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[25] See also Section 13 of the Act which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

[26] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233; *Radio Officers'* v. *N.L.R.B.*, 347 U.S. 17, 39-40.

and "felt the [strikers] were not entitled to [the benefit] unless they returned to work, or until they resigned from the Company" (Tr. 803). But as the Board found, this was not an accurate statement of Company policy (R. 60). It was provided in the 1960 contract that employees could receive pay in lieu of vacation (G.C. Exh. 3(c), Art. VIII), and this article was incorporated in each of the Company's subsequent contract proposals (G.C. Exh. 3(f), Art. VII; G.C. Exh. 3(h), Art. VII; G.C. Exh. 3(q), Art. VIII). Furthermore, at a hearing before the California Department of Industrial Relations, Willoughby admitted that the vacations were due but that the men would not be paid for the duration of the strike.

A recent Supreme Court case, *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 is, we submit, controlling on this point. In *Great Dane*, as here, the Company withheld vacation benefits from striking employees. The Supreme Court said, "There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form." 65 LRRM at 2468. Here, as in *Great Dane*, the Company failed to justify its action by evidence of legitimate business motives. 65 LRRM at 2469. Accordingly, the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by withholding vacation benefits from employees because they were engaged in a strike.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
EDWARD E. WALL,
Attorneys,

National Labor Relations Board.

September 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * * *

DEFINITIONS

Sec. 501. When used in this Act—

* * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court: (Numbers are to pages of the reporter's transcript)

Board Case No. 21-CA-6299

GENERAL COUNSEL'S EXHIBITS

Number	Identified	Received	Rejected	Withdrawn
1(a)-1(s)	19	19		
2	21	21		
4(a)-4(e)	22	22		
5	34	34		
3(a)-3(aa)	49	49		
3(v)				48
3(bb)	49	221		
6	219		222	
7	368	368		
8	401	402		
9	450			453
10	454		457	
11(a)	543	544		
11(b)	545	545		
11(c)	545	546		
12(a)-12(b)	547	548		
13	1089	1091		

RESPONDENT'S EXHIBITS

Number	Identified	Received	Rejected
1-2	365	365	
3	561	562	
4	568	568	
5(a)-5(c)	593		593
6(a)-6(g)	674	674	
7(a)-7(b)	861	872	
8-9	887	888	
10	897	897	
11	989		

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No. 21,902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MACMILLAN RING-FREE OIL CO., INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF RESPONDENT MacMILLAN RING-FREE OIL CO., INC.

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On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF RESPONDENT MacMILLAN RING-FREE OIL CO., INC.

STATEMENT OF THE CASE.

This case arises out of a Petition for Enforcement of an Order issued by Petitioner, National Labor Relations Board (hereinafter "Board"). The Board below adopted the findings, conclusions and recommendations of the Trial Examiner who had found that the Company violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136,73 Stat. 519 29 U.S.C. §161, *et seq.,* hereinafter "Act"), for having failed to negotiate in good faith with the representative of its production and maintenance employees, and Sections 8(a)(3) and (1) of the Act by withholding vacation pay from four striking employees.

JURISDICTION.

The Respondent concedes the jurisdiction of this Court as set forth in Petitioner's Brief (Pet. 1-2).[1]

STATEMENT OF FACTS.

The following is a partial statement of the relevant facts. Because of the nature of the questions presented to this Court, it is not necessary to belabor the extended and lengthy facts which were introduced during the hearing below, or to contest the many findings of the Board which are irrelevant to a resolution of these issues. Some setting forth of the facts relating to specific arguments are included in the argument portion of the brief as seemed appropriate for clarity and understanding.

A. Background of Negotiations.

The Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Long Beach Local No. 1-128 (hereinafter referred to as "Union" or "OCAW"), organized the employees of the Company and was certified to represent them in 1960 [R. 21; Tr. 51, G.C. Exh. 2]. The Union, in 1960, successfully negotiated what objectively must be termed a very favorable Collective Bargaining Agreement from the Union viewpoint [R. 21; Tr. 51,585, G.C. Exh. 3(c)]. That agreement contained some unique clauses, such as a wage reopening clause which permitted either part to reopen wages by serving upon the other party, sixty (60) days'

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[1]References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings," are designated as "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated as "Tr." References designated "R. Exh." and "G. C. Exh." are to the exhibits of Respondent and the General Counsel, respectively. References designated "Pet." are to portions of Petitioner's Brief.

written notice at any time during the life of the agreement (Art. II). The Union quickly availed itself of the wage reopening clause, serving notice within sixty (60) days of the inception of the agreement [R. 21; Tr. 52,580].

Within the first year of Union representation, there were a series of strikes, the last one in 1961, lasting for over seven (7) weeks [R. 20-24; Tr. 603-605, 608-609, 880]. The parties signed a Strike Settlement Agreement following the seven week strike [G.C. Exh. 3(e)]. Although in the Strike Settlement Agreement the parties agreed to negotiate a new agreement [R. 24; G.C. Exh. 3(e)], the Union failed and refused to engage in meaningful negotiations for a new agreement different in any realistic sense from the old 1960 collective Bargaining Agreement [R. 24-25; Tr. 63-64, 66, 312; R. 27; G.C. Exh. 3(g); Tr. 200, 213-214; R. 39; G.C. Exh. 3(aa); Tr. 809, 991].

The Company presented a proposal in writing incorporating many of the provisions of the 1960 agreement which were consistent with what the Company considered to be needed for reasonable management operating efficiency and authority, and in addition, proposed new provisions to correct some of what it believed to be obvious inequities in the 1960 agreement [R. 25; G.C. Exh. 3(f)].

The Company, during the course of bargaining from 1960 through 1965, made various proposals to the Union, including two full written proposals [R. 25; G.C. Exh. 3(f); Tr. 63; R. 27; G..C Exh. 3(h); Tr. 111]. The Union during this period also submitted two "new" written proposals [R. 27; G.C. Exh. 3(g); Tr. 200, 213-214; R. 39; G.C. Exh. 3(aa); Tr. 809, 991]. However, as the analysis of these Union proposals set forth below dramatically illustrates, the Union

completely failed and refused to make constructive counter-proposals to the Employer's proposed modifications, but instead persisted in demanding reinstatement of the 1960 agreement changed only to include economic improvements.

The Company had substantial reason to believe that the Union and its members in the conduct of their three precipitous strikes had acted irresponsibly and, after the settlement of the last strike in June of 1961, that the Union had authorized and engaged in acts of harassment against nonstriking employees and the Company [Tr. 881-884, 893].

Numerous meetings were held with merely a regurgitation of the respective positions of the parties. Some matters were resolved during this period of negotiations such as an agreement granting increased vacations [R. 30, G.C. Exh. 3(m); Tr. 127] and another agreement providing a five percent wage increase [R. 29; G.C. Exh. 3(k); Tr. 118, 783, 898], but the parties remained apart on what both considered to be the most important and crucial provisions of the new agreement; union security, check off, the grievance and arbitration procedure and basic management rights. During this period of time, the Union did not give even an iota of recognition to any of the management's requests or proposals in order to achieve accommodation and reconciliation of their interests vis-a-vis those of management.

Finally, on September 2, 1964, a further "final" and complete proposal in a written form was presented by the Company together with a substantial wage increase [R. 33-34, G.C. Exh. 3 (q), Tr. 136, 790]. This was rejected out of hand by the Union without a moment's consideration with an insistence on the 1960 agreement with its economic amendments, or as its minimum de-

mand, an immediate institution of the union shop, the recognition clause, a 4½% wage increase and further negotiations [Tr. 310]. With precipitous haste and within six days after submission of the Company's proposals and without regard to the substantial wage increase or, in the alternative, a pension plan (which wage increase offer the Union denied had been made on September 2, 1964, but, as found by the Trial Examiner, had been made by the Company prior to the strike [R. 17]), the Union called its members out without even taking a strike vote on the Company's last proposal [Tr. 346].

During the strike, there followed the same pattern of irresponsibility as in the previous strikes and post-strike periods. There were numerous incidents of violence, mass picketing, damage to Company property and threats of violence against nonstrikers and new employees [R. 40-43]. Some of these acts were more serious than practically any experienced in recent years, such as a molotov cocktail being thrown into a non-striking employee's child's bedroom [Tr. 700, 713-714]. The Petitioner argues that because there was no positive proof that officials of the union caused the violence, all the evidence of violence was irrelevant to a consideration of any position taken, or failed to be taken, by the Employer (Pet. 35-36). We believe that the evidence establishes such connection without contradiction [Tr. 700, 713-714, 717, 721, 743, 760-763]. Furthermore, anyone versed in the dynamics of labor relations and employee and management relations must recognize that the activities such as engaged in in the instant case must as a necessity create such an all pervasive and dominating atmosphere so as to influence the parties, both consciously and subconsciously, in their adoption of bargaining postures. The Employer had

every reason to believe that the Union was responsible, either actively or passively, for this conduct.[2]

During the strike the parties continued to meet and to discuss the proposals on which they were in disagreement.

A charge was filed by the Union on November 10, 1964 and a copy of the charge was served on the Company on the same date by registered mail. A complaint was issued on August 11, 1965.

B. Conduct of the Hearing.

i. Introduction of Evidence Preceding 10(b) Period of Limitations.

At the inception of the hearing before the Trial Examiner, counsel for Company repeatedly objected to the wholesale introduction of evidence preceding the 10-(b) period of limitations of the Act, and although he granted a "continuing objection," the Trial Examiner allowed the introduction of a myriad of events and acts antedating the 10(b) period by as much as three and one-half years [Tr. 35, 48, 51-52].

ii. Quashing of Subpoenas Served Upon Federal Mediators.

Commissioners Grant Haglund and Jules Medoff were present at six of the negotiating meetings from November 12, 1963 to January 12, 1965 which were attended by the parties principal negotiators [G.C. Exh. 3(b)]. The Company properly served subpoenas on the two mediators [Tr. 637-638]. A petition was filed by the Federal Mediation and Conciliation Service to

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[2]The return of one striker to work who was named in certain court papers as having engaged in isolated incidents is but a further recognition of the concern by the Company that the Union, rather than the individual employee, was responsible [R. 42, Tr. 755-757].

revoke the subpoenas, and the Trial Examiner granted the petition [R. Exh. 6(c), Tr. 669, 636-675].

During the argument before the Trial Examiner, counsel for Company clearly set forth why the Company should be allowed to avail itself of the testimony and records of the two mediators if it were to be given a fair hearing. As an offer of proof, counsel for Company set forth that one of the mediators, Mr. Haglund, had met with respresentatives of the N.L.R.B. on more than one occasion, revealing information as to what transpired during the meetings between the parties [Tr. 654]. The Company also contended that serious and critical issues of credibility could be resolved only by compelling the testimony of the mediators [Tr. 651].

Subsequently in the hearing, Mr. Becker was not permitted by the Trial Examiner to testify concerning his knowledge that the Federal Mediation and Conciliation Service was cooperating with the N.L.R.B. in the preparation of its case. Counsel for Company then made an extended offer of proof to the effect that one of the N.L.R.B. agents, by the name of Belle Karlinsky, had admitted to Mr. Becker that she had discussed the case with Mr. Haglund, and that Mr. Haglund had admitted to Mr. Becker that he had given some information to Mrs. Karlinsky, at least he had given to her the dates of the meetings between the parties [Tr. 949-952].

Later in the hearing, because of the importance of the issue, counsel for Company renewed the above offer of proof and moved that the Trial Examiner reconsidered his ruling on the Petition to Revoke. The Trial Examiner denied the motion [Tr. 962].

QUESTIONS PRESENTED.

The questions presented are as follows:[3]

(1) Did the Company violate Section 8(a)(5) of the Act by not acceding to the Union's demand for a return to the 1960 Collective Bargaining Agreement during the period of negotiations?

(2) Is that portion of the Board's Decision and Order finding that the Company violated Section 8-(a)(5) of the Act unenforceable because it is based entirely on events which preceded the 10(b) limitation period of the Act?

(3) Was the Company denied due process by the Trial Examiner's refusal to compel officials of the Federal Mediation and Conciliation Service to testify?

(4) Did the violence, threats and intimidation of the pickets, directed toward the Company and its employees suspend the Employer's duty to bargain from September 8, 1964 until the date of the hearing, or did such violence create an atmosphere which precluded measuring the good faith of Company?

(5) Could the Company be found to have violated Section 8(a)(5) if the Union itself was bargaining in bad faith and/or in such a manner that the Company's good faith could not be measured?

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[3]Although the Company believed that it was justified in cancelling all vacations for all employees, whether or not they were working or striking, no detailed argument will be made at this time as to the correctness of that portion of the Board's order relating to a violation of Sections 8(a)(1) and (3) because of its refusal to grant vacation pay to certain strikers. Inasmuch as this violation was found to be completely unrelated to the refusal to bargain aspects of the case, it should have no relevance to a determination of the questions herein [R. 61, 64].

ARGUMENT.

I.

At No Time Did the Company Engage in Dilatory or Bad Faith Bargaining in Violation of Section 8(a)(5) of the Act.

Because of the lengthy hearing, voluminous transcript and discursive Intermediate Report which was adopted in its entirety by the Board, it is necessary to capsulize the findings by the Trial Examiner so that they may be put in proper perspective.

First, as will be discussed below, the Trial Examiner based his determination that the Company violated Section 8(a)(5) of the Act completely upon evidence which antedated the period prescribed by Section 10(b) of the Act, and therefore, his findings are not supported by substantial evidence in the record.

Secondly, although the facts in the case warrant the conclusion that the Company engaged in admittedly hard bargaining, its action and conduct were in complete accord with the dictates of the Act. However, the Trial Examiner must have reached the conclusion that if an employer and a union bargained for over four years without reaching a definitive collective agreement, the employer must have been at fault. The Examiner combed the transcript for minor contradictions or inaccuracies in the testimony (many, if not all, predating the 10(b) period) which were magnified out of all proportion so that they might appear to lend support to his determination of bad faith bargaining. (Petitioner concedes that none of the proposals of Company were a *per se* violation of the Act and that the

Company had the right to request the Union to settle for something less than the 1960 contract [Pet. 34, Tr. 21]).

As is demonstrated by the Trial Examiner's summary, he based his entire determination that the Company had bargained in bad faith upon (1) the Company's "open shop" and other "inhibiting" proposals, (2) the Company's alleged "foot dragging" in arranging a meeting following the session of December 13, 1963, (3) the Company's method of placing in effect a vacation proposal outside the 10(b) period; (4) the fact that no meeting was held between December 13, 1963 and May 7, 1964 and (5) the Company's failure to present a final proposal in a written form until September 2, 1964 [R. 58, lines 24-40].

As for the Company's "open shop" proposal, although the Trial Examiner avoided stating that such was his determination, it is obvious from a reading of his entire opinion that he concluded that any such proposal having once had a union shop in fact constituted *per se* a refusal to bargain. The same is true of other proposals made by the Company, relied upon by the Trial Examiner as inhibiting and which were first made long before the filing of the unfair labor practice charge.

In a similar error, the Trial Examiner took special efforts in his Intermediate Report to continually disregard the testimony of the Company's witnesses and to discredit the asserted positions of the Company by noting the Company's alleged "foot dragging" in arranging a meeting following the session of December 13, 1963. Company's witnesses testified that a final proposal was presented to the Union then and there, on December 13, 1963 [Tr. 781, 903-904]. It was clear from that testimony that Mr. Becker's promise to place the Company's final proposal to writing and his state-

ment that it would take some time did not have the meaning put upon it by the Trial Examiner. The Trial Examiner would have the Court believe that Mr. Becker used the length of time necessary to place the Company's proposal to writing as a dilatory tactic and that the Union was not informed of the Company's final proposal until September 2, 1964. Clearly within the context of the meeting of December 13, 1963, Mr. Becker meant that it would take too long to reduce the Company's final proposal, which had been given to the Union negotiators orally, to writing during the course of *that* meeting. Such being the case, and with no expression of interest on behalf of the Union negotiators in signing such a proposal, it is not difficult to understand why Mr. Becker did not view the reduction of the Company's final proposal to writing as being a matter which should be done immediately or which could have any influence on preventing or delaying the parties from reaching an agreement. The Parties full well knew their respective positions, and the Company was certainly aware of the Union's intransigence. The reduction to writing was a clerical act which did not advance the understanding of the parties at all. Yet, time after time, the Trial Examiner makes reference to this ambiguous statement of Mr. Becker and uses it, a statement having no evidentiary value or weight at all, to bolster his determination as to the Company's state of mind at all times relevant to the allegations of the Complaint. The Petitioner used the Trial Examiner's findings that the Company did not present a final proposal until September 2, 1964 in an identical manner for identical purposes (See Pet. 32-33).

From the weight of the evidence, as discussed above, the Company submitted its "final proposal" orally at the meeting of December 13, 1963.

The Petitioner's attempt to characterize Company's bargaining as revealing "foot dragging" is not substantiated by the evidence and such language is a mere label. It is undisputed that the Employer always met with the Union upon request. Although at first blush the Union's principal negotiator's evasive answers to questioning in regard to this matter are quite confusing to say the least, nevertheless, once his contradictory verbalizations are untwined, it is clear that the Company's negotiators only cancelled one meeting, and the Union negotiators did not offer any protest at that one cancellation.

> "Trial Examiner: Let me ask you. On any occasion when there was, during the course of your negotiations, postponement of a set meeting by Mr. Becker on any occasion, did you or anybody else representing the union to your knowledge offer a protest to it?
>
> The Witness: That is the only time I recall when we didn't offer a protest.
>
> Q. (By Mr. Carr) You offered no protest when this meeting was changed from August 20th?
>
> Trial Examiner: He just said so.
>
> Mr. Carr: I know. I am just trying to put the thing in proper context.
>
> Trial Examiner: He may give you another answer, but go ahead, if you want.
>
> Q. (By Mr. Carr) However, you did protest every other time he cancelled a meeting?
>
> A. I just told you I don't recall any other time of him cancelling." [Tr. 332, line 19, to 333, line 12].

Additionally, it must be noted that Petitioner largely bases its entire position upon the label of "foot dragging" which was a conclusion that the Company failed to meet during a period *which occurred prior to the*

limitation period set forth in Section 10(b) of the Act. Obviously, the Union was not concerned with the absence of meetings during the 10(b) period, since on May 7, 1964, as found by the Trial Examiner, the Union itself agreed to defer negotiations for over a four-month period [R. 31; Tr. 785-786, 908].

Certainly after the meeting of September 2, 1964 there may be no contention that the Company was dilatory or guilty of "foot dragging." From September 2, 1964 until December 4, 1964, the parties met on six occasions: September 2, 1964; September 4, 1964; October 8, 1964; November 6, 1964; November 24, 1964; and December 4, 1964 [R. 34, 37, 38; G.C. Exh. 3(b); Tr. 789, 792, 796, 797, 798, 799]. Since Mr. Becker was to be in New York on another matter, the parties agreed not to meet until after the holidays [Tr. 939]. Taking into consideration the fact that the Union had elected on September 8, 1964 to engage in an economic struggle with the Company, and that, because of the violence, mass picketing and intimidation which followed, the Company was in a state of "siege," it is not surprising that the parties did not meet at more frequent intervals during that period of time. Furthermore, as considered in Section IV, *infra,* the Union's consistent "take it or leave it" attitude manifested by its adamant refusal to suggest or consider significant modifications of the 1960 agreement was not such that any employer would be obligated to pursue additional meetings. The Union's attitude made it absolutely clear that the Company would arrange as many meetings as it desired and that its position would not vary.

Thus, when the Intermediate Report of the Trial Examiner is dissected, it may only be concluded that the Company was found guilty of a refusal to bargain because the two parties failed to reach an agreement and because the Trial Examiner found various proposals of

the Company to be repugnant to his personal view of what constitutes a reasonable provision for a collective bargaining agreement.

Under the decisional law of the Supreme Court and the N.L.R.B. it is clear that the Board cannot pass upon the substantive content of any of the Employer's proposals. The mere making of a proposal or maintaining of a position which is unacceptable to a union is not violative of the Act if the proposal is sincerely and genuinely adhered to by the proposing party.

Section 8(d) of the Act expressly provides by its terms that the obligation to bargain collectively compels neither party to agree to a proposal or requires the making of a concession. In the leading Supreme Court case interpreting the duty to bargain, *N.L.R.B. v. National American Insurance Co.* (1951), 343 U.S. 396, it was held that

> "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis added).
>
> *N.L.R.B. v. National American Insurance Co.*, 343 U.S. 396, 404.

In addition, the Court, laying down guidelines for the direction of the Board in future cases admonished:

> *"Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements."* (Emphasis added).
>
> *N.L.R.B. v. National American Insurance Co.*, 343 U.S. 396, 408-409.

Numerous Circuit Court and N.L.R.B. decisions have amplified this rationale and interpreted Section 8(d) as forbidding the Board from passing upon the substantive provisions of the parties' proposals.

In *Dierks Forests, Inc., etc.* (1964), 148 N.L.R.B. 923, the Board recently reiterated the philosophy expressed in the *National American Insurance* case.

> "Admittedly, the Respondent here engaged in a course of 'hard bargaining' and, as noted by the Trial Examiner, the Union was disappointed when it made concessions but failed to receive a *quid pro quo* from the Respondent. But the Board has been admonished by the Supreme Court that it may not, 'either directly or indirectly, compel concessions or otherwise sit in judgment upon the terms of collective-bargaining agreements.' "
>
> *Dierks Forests, Inc.,* 148 N.L.R.B. 923, 930.

Dierks is in fact a more difficult case from the employer's position in that there the Union had made concessions while here it did not.

See also:

N.L.R.B. v. Cascade Employers Association (9th Cir. 1961), 296 F. 2d 42.

In *McCulloch Corporation* (1961), 132 N.L.R.B. 201, the Board adopted the findings, conclusions and recommendations of the Trial Examiner. This case is important because the issues before the Trial Examiner were on all fours with the basic question of union security presented in the instant case. The company had taken the position from the beginning of negotiations that it would agree to neither a union shop nor check-off provision. Also, as in the instant case, there was in existence another collective bargaining agreement to which the company was a party which contained a union

shop provision [See G.C. Exh. 3(bb)]. Nevertheless, the Trial Examiner, recognizing that some unions are able to more effectively wield their strength in the collective bargaining forum and thereby obtain concessions while other unions are not, held that the mere refusal of the employer to agree to a union security clause was not violative of Section 8(a)(5) of the Act. (This is even apart from continuing and serious evidence of union irresponsibility such as here by which the union may be considered to have forfeited a reasonable claim to a union shop.)

Similarly, just as the Board may not pass upon the substantive proposals which are exchanged between the parties at a negotiating session, the mere fact that one party adheres to certain positions without deviation on certain proposals may not sustain a finding that that party refused to bargain in good faith.

N.L.R.B. v. Almeida Bus Lines, Inc. (1st Cir. 1964), 333 F. 2d 729;

Fetzer Television, Inc. v. N.L.R.B. (6th Cir. 1963), 295 F. 2d 244;

The Philip Carey Mfg. Co. (1963), 140 N.L.R.B. 1103;

Bethlehem Steel Co. (1961), 133 N.L.R.B. 1347;

Intercontinental Engineering & Manufacturing Co. (1965), 151 N.L.R.B. 139.

The Petitioner, in its brief, makes much of the fact that the Company attempted to reobtain for itself various management prerogatives. Certainly the law is not that once an employer executes a contract with a union, it may never again reobtain through negotiations for a new contract management prerogatives which he previously bargained away. First, as discussed above, the Board may not pass upon the substantive content

of the Employer's proposals. Secondly, the law is clear that one party may make any proposal as long as it is not illegal, and if genuinely adhered to, may maintain its adherence to that proposal throughout the course of negotiations. As the Court stated in *N.L.R.B. v. Cascade Employers Association* (9th Cir. 1961), 296 F. 2d 42, the Board is restricted in applying a totality of circumstances test and may not find that certain proposals of the Employer are, *per se,* violative of Section 8(a)-(5) if they do not violate some other section of the Act. The point is so obviously without dispute that it is not necessary to belabor it. For example, in *N.L.R.B. v. Almeida Bus Lines* (1st Cir. 1964), 333 F. 2d 729, the court reversed a finding by the Board that the employer had violated Sections 8(a)(5) and (1) of the Act. Once again, the facts presented in that case were identical with the conduct of the parties in the instant case. The union, since the first discussion of its proposals, had taken a position from which it would not waiver. It maintained that any collective agreement must include provisions for union security, dues check-off, arbitration and job selection on the basis of seniority. "Respondent was equally adamant that it would accept none of the four 'must' proposals." Also,

> "In addition to rejecting the Union's four 'must' proposals, respondent refused to grant any paid holidays, provide uniforms or provide a health and life insurance program. Contending the Almeida Bus Lines, Inc. was not in the charter business, it refused to discuss any contract provision concerning charter work. Counter offers made by Waldron with respect to overtime, seniority in layoffs and rehiring, length of work day, vacations, duration of the contract, and grievance procedure were not accepted by the Union and remained subject to further negotiation.
>
> * * * *

"The parties met again on March 1 for about six hours and the existence of a deadlock became apparent. Neither side retreated from its previous position save that on wages.

* * * *

"The meetings held on April 13, 18 and 25 accomplished very little and displayed continued intransigence on the question of the four 'must' provisions. * * *"

N.L.R.B. v. Almeida Bus Lines, 333 F. 2d 729, 732-733.

As in the instant case, the employer had stated to the union that he would "bend" on wages if the union would do some bending on their clauses. The Court held on those facts that the employer was not guilty of a refusal to bargain.

"Here, the Union was determined to negotiate with respondent essentially the same contract it had negotiated with other bus lines. It would not retreat from certain principles and its frustration increasingly mounted when respondent showed no intention to agree to those principles, although it was willing to agree to others."

* * * *

"The statutory duty to bargain collectively as set forth in Section 8(d) of the Act imposes upon the parties the obligation 'to meet * * *and confer in good faith with respect to wages, hours and other terms and conditions of employment' with a view to the final negotiation and execution of an agreement. The statute states specifically that this obligation 'does not compel either party to agree to a proposal or require the making of a concession.' Thus the adamant insistence on a bargaining position is not necessarily a refusal to bargain in good

faith. *National Labor Relations Board v. American Nat. Ins. Co.,* 343 U.S. 395, 72 S. Ct. 824, 96 L.Ed. 1027 (1952). 'If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system * * * of free collective bargaining.' *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960). The determination as to whether negotiations which have ended in stalemate were held in the spirit demanded by the statute is a question of fact which can only be answered by a consideration of all the 'subtle and elusive factors' that, viewed as a whole, create a true picture of whether or not a negotiator has entered into discussion with a fair mind and a sincere purpose to find a basis of agreement. *NLRB v. Herman Sausage Co., supra; NLRB v. Reed & Prince Mfg. Co.,* 205 F. 2d 131 (1st Cir. 1953). Individual acts or statements of a negotiating party which appear contrary to the required attitude cannot be drawn upon to dilute a finding of good faith where the totality of the party's conduct conforms to the dictates of the statute."

N.L.R.B. v. Almeida Bus Lines, 333 F. 2d 729, 735-736, 731.

Thus, no finding of a refusal to bargain may be based upon either an employer's maintaining a set position on certain items, such as union shop and check-off, or on attempts to retain certain management rights to itself which are frequently sought and sometimes obtained by unions.

II.

The Finding That the Company Failed to Bargain in Good Faith Is Totally Unsupported by the Evidence, and Based Entirely Upon Events and Negotiations Occurring More Than Six Months Before the Filing of a Charge.

The Trial Examiner's discursive opinion, which was adopted by the Board in its entirety, constitutes forty-eight pages, with sixty-two lines to the page. The Trial Examiner expressly states that the role of events which antedated the six-month limitation period prescribed by Section 10(b) of the Act is merely to shed light on the true character of matters during the limitation period. However, an analysis of the Trial Examiner's findings demonstrates beyond any dispute that his determination that the Company bargained in bad faith was based entirely upon events antedating the limitation period. As such, the Trial Examiner's conclusions are not supported by the *reliable probative and substantial evidence* (Administrative Procedure Act, Section 7(c) 60 Stat. 241, 5 U.S.C. §1006) nor are they based on *substantial evidence on the record as a whole* (Sections 10(e) and (f) of the Act) nor was the case decided on a preponderance of the testimony (Section 10(c) of the Act). By established authority, the burden of proof rests with General Counsel to establish the allegations of the Complaint by substantial evidence. This burden does not shift and the Company is not required to prove the lawfulness of conduct on which there is no evidence to show that it is unlawful. Furthermore, as will be demonstrated, the Board based its determination that Company had bargained in bad faith solely upon events which as a matter of law may not support a finding that Company violated the Act.

Section 10(b) of the Act provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . .*". (Emphasis added).
>
> 29 U.S.C. §160(b).

At the very inception of the hearing, as noted above, counsel for the Company objected strenuously to the wholesale introduction of all evidence prior to the 10(b) period of limitations [Tr. 35, 48]. The objection was overruled by the Trial Examiner [Tr. 35, 51-52] and there was thereafter permitted throughout the hearing the introduction of evidence of acts occurring as early as 1960.

The complaint in this proceeding is dated August 11, 1965, and is based upon a charge which was filed on November 10, 1964. Therefore, Section 10(b) prohibits the finding of any unfair labor practice based upon events which occurred prior to *May 10, 1964.*

Although the Trial Examiner discusses to some extent the conduct and proposals of Company occurring subsequent to September 8, 1964, the Trial Examiner's own findings illustrate that he determined that the Com-

pany had refused to bargain solely upon events prior to September 8, 1964 because he found that the strike that began on September 8, 1964 *was caused* and prolonged by the Company's violation of its bargaining duty [R. 58, lines 42-46; R. 64, lines 34-36]. *That being the case, the record must support a refusal to bargain charge as of September 8, 1964.* However, an examination of the few events, proposals, conversations, etc. in evidence which occurred during the period May 10, 1964 to September 8, 1964, which were considered by the Trial Examiner, demonstrates they are totally insufficient to sustain a finding that the Company had violated its bargaining duty.

First, the Trial Examiner found that the parties had agreed at the meeting of May 7, 1964 to postpone negotiations during the pendency of industry-wide negotiations in order to allow the industry to reach a settlement that could be used by the parties to measure their bargaining proposals with regard to the economic provisions of any new collective agreement [R. 31, lines 25-39]. Since this agreement occurred before the six-month limitation period, then admittedly as of May 10, 1964, the parties having agreed not to negotiate, the Company could not have been in violation of its bargaining duty. The first event occurring during the six-month limitation period was a telephone conversation between Mr. Cody and Mr. Becker during the first part of August [R. 32; Tr. 132]. There is absolutely no evidence of any acts, proposals, negotiations, conversations, discussions, refusals to meet, or any other evidence during the six-month limitation period prior to this telephone conversation.

The Trial Examiner states that "the only matter of any substance in issue [referring to the details of the first August telephone conversation] is whether Mr.

Cody or Mr. Becker initiated the first call in August . . ." [R. 32, lines 18-20]. Both Mr. Cody and Mr. Becker claimed to have initiated the first telephone conversation which occurred in the first part of August [R. 31, lines 44-45; R. 32, lines 6-7]. However, despite the fact that the Trial Examiner found that Mr. Cody initiated the first telephone conversation [R. 31, lines 41-44], there is certainly no substance in such a finding upon which to base a determination that the Respondent refused to bargain [R. 31; Tr. 131, 785-786, 908]. It is beyond dispute that during the first telephone conversation which occurred between Mr. Cody and Mr. Becker in the first part of August, 1964, Mr. Cody did tell Mr. Becker that the industry had not yet reached a settlement [R. 32; Tr. 331]. Therefore, according to their prior agreement, there was no immediate compulsion upon either party to begin bargaining, and a determination whether or not Mr. Cody did in fact initiate the first telephone conversation in August constitutes not a scintilla of evidence to support a determination that Company had violated its bargaining duty. Thereafter, Mr. Becker, according to Mr. Cody's own testimony, did call Mr. Cody to arrange the negotiating session of September 2, 1964 [R. 31; Tr. 910-911, 838-840]. Certainly the Trial Examiner did not base his finding that the Company had violated the Act upon Mr. Becker's initiation of a bargaining session by his telephoning Mr. Cody sometime around the middle of August.

Thus from May 10 until the first part of September, 1964, there was absolutely no action taken by either of the parties upon which the Trial Examiner would be correct in attempting to utilize evidence of acts occurring prior to May 10, 1964, to shed light upon their true character.

The parties did meet on September 2, 1964 and the Trial Examiner did find that on that date Mr. Becker did make an offer to the Union of either a pension plan or a wage increase and did present to the Union a written contract proposal [R. 33; Tr. 135]. It is true, as noted by the Trial Examiner, that the Union did reject the Company's offer of September 2, 1964 [R. 33; Tr. 516, 790]. However, there is absolutely not a scintilla of evidence in the record concerning the meeting of September 2, 1964 which establishes that the Company was either attempting to undercut the Union or was bargaining in bad faith. The parties met again on September 4, 1964 under the auspices of the Federal Mediation and Conciliation Service. However, inasmuch as the Trial Examiner found that the parties were principally concerned at that meeting with a determination of whether or not the Company had in fact made a wage offer of 4½% on September 2, 1964 and because the Trial Examiner found that the Company had made such a wage offer [R. 34-36], nothing that occurred at that meeting demonstrates that the Company was refusing to bargain. The Trial Examiner himself summarized the positions of the parties as of September 4, 1964:

> "As of that point, the divisions between the parties consisted, basically, of the differences between the types of pension plans they had respectively proposed, and between the Union's contract proposal of September 19, 1962, the terms of which, putting aside its wage schedule and a relatively few minor changes, were virtually identical with those of the 1960 contract, and the Company's contract proposal of September 2, 1964, which, as previously indicated, was little different from the Company's proposal of October 18, 1962." [R. 36, lines 39-46].

The negotiating session of September 4, 1964, was the last meeting held by the parties prior to the strike, and except for the letter of September 3, 1964 which the Company mailed to its employees, was the last event occurring within the limitation period considered by the Trial Examiner.

The Trial Examiner expressly held that the record would not sustain a conclusion that the relevant statements in the Company's letter of September 3, 1964, "amount either to manifestations of bad faith in bargaining or any abridgement of the rights guaranteed employees by Section 7 of the Act." [R. 36, lines 29-30]. Therefore, the letter of September 3, 1964 was certainly not a basis for a determination that the Company had refused to bargain prior to September 8, 1964.

In order to realize the exceptional facts of the instant case and the clearly erroneous determination of the Trial Examiner and the Board, all of the events occurring during the six-month limitation period prior to the strike of September 8, 1964, as of which time the Trial Examiner concluded the Company was derelict in its bargaining duty, are set forth below in schedule form.

May 7, 1964 Agreement of parties not to meet until Industry Settlement final.

May 10, 1964 (*Inception of six-month limitation period*)

August (?) 1964 Becker-Cody telephone conversation *re* industry settlement.

August (?) 1964 Becker calls Cody to arrange meeting of September 2, 1964.

Sept. 2, 1964 Parties meet, Company offers 4½% wage increase or pension plan and submits written proposal.

Sept. 3, 1964 Company mails letter to employees (*expressly found to be no evidence of bad faith*).

Sept. 4, 1964 Negotiating session mainly to determine whether Company made wage offer of 4½%.

Sept. 8, 1964 Strike (*Date as of which Trial Examiner found Company had refused to bargain.*)

As the discussion of the law demonstrates, *infra,* Section 10(b) has been held by the United States Supreme Court to be a statute of limitation and not an evidentiary rule. As such, it was not waived by the Company which continually raised the objection that its rights under Section 10(b) were being violated by the Trial Examiner's allowing the wholesale introduction of evidence antedating the six-month limitation period [Tr. 35, 48, 51-52]. The Trial Examiner expended at least fifty percent of his Report discussing events occurring prior to May 10, 1964 and attempts to sustain his determination that the Company had violated its bargaining duty prior to September 8, 1964 by the bald assertion that the role of events antedating the limitation period was merely to shed light on events occurring within the period. However, as the above discussion reveals, *there was absolutely no evidence of any happenings during the limitation period of such a character that the evidence of events prior to May 10, 1964, could legitimately be utilized by the Trial Examiner.* As an examination of the Board decisions themselves reveal, *there must be substantial evidence of events occurring within the statutory period sufficient to sustain a finding of bad faith bargaining* without the merit of the allegations in the Complaint being shown solely by reliance upon earlier events.

Was the Trial Examiner's determination based upon a finding that the Company did not demonstrate due diligence in attending negotiating sessions? In his opinion he consistently refers to the evidence antedating the six-month limitation period as demonstrating the "foot dragging" tendencies of Company. However, as the parties had agreed on May 7, 1964 not to meet until a certain time, and when that time was reached the parties did in fact meet, there is absolutely not a scintilla of evidence within the relevant period upon which to conclude that Company was engaging in "foot dragging" or dilatory maneuvers. Similarly, inasmuch as the Company did in fact meet, did present a proposal with increased economic benefits, and demonstrated a desire to reach an agreement, there is no evidence within that period that it refused to bargain in good faith. The only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior.

In the leading case of *Local No. 1424, International Machinists v. N.L.R.B. (Bryan Mfg. Co.)* (1960), 362 U.S. 411, the Supreme Court sought to define the scope and application of Section 10(b). The Court held, in that particular case that Section 10(b) is a statute of limitations, not a rule of evidence, and, as such prohibits the Board from sustaining the findings of any unfair labor practice upon acts which occurred before the six months period.

> ". . . we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been destroyed,

witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep No. 245, 80th Cong. 1st Sess, p. 40, and of course to stabilize existing bargaining relationships.

* * * *

"As expositor of the national interest, Congress, in the judgment that a six-month limitations period did 'not seem unreasonble,' HR Rep No. 245, 80th Cong, 1st Sess, p. 40 barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. 'It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . .' Colgate-Palmolive-Peet Co. v. NLRB, supra (338 US at 363)." [P. 839, 845]

Local No. 1424, International Machinists v. N.L.R.B., 362 U.S. 411, 419, 429.

The Petitioner's attempt throughout its brief to establish an illegal motivation on the part of the Company because of various minor inconsistencies in the testimony of the Company's negotiator, Mr. Becker, glaringly illuminates the policy considerations leading to the passage of 10(b), as noted by the Court above. Mr. Becker was called upon to testify concerning minute details of negotiations spanning a four year period, an impossible task for anyone. Is there any doubt that recollections had become "dim and confused"? Will this Court sanction a remedial order of the Board based solely on events of ancient history?

The Court in *Bryan Manufacturing Co.* also noted, with apparent approval, the Board's refusal to permit reliance upon evidence relating to acts occurring prior to

the six-month period for the purpose of illuminating conduct within the six-month period where the evidence within the statutory period was too sketchy to warrant a finding of unlawful conduct.

> "Indeed, some Board cases have gone even further and held §10(b) a bar in circumstances when, although none of the material elements of the charge in a timely complaint need necessarily be proved through reference to the barred period—so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint—yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on the earlier events. See, e.g., News Printing Co., 116 NLRB 210, 212; Universal Oil Products Co. 108 NLRB 68; Tennessee Knitting Mills, Inc. 88 NLRB 1103."
>
> *Local No. 1424, International Machinists v. N.L.R.B.,* 362 U.S. 411, 421.

The Company contends that just such a case exists in the instant situation. There was no evidence of conduct within the statutory period sufficient to justify the wholesale introduction of evidence preceding the filing of the charge by over three years.

The decision of this Court in *N.L.R.B. v. Strong* (9th Cir. July 14, 1967), ... F. 2d ....., 65 L.R.R.M. 3012, further supports the position of the Company. In that case this Court recognized the effect of Section 10(b) of the Act and stated that if "nothing further" occurred during the 10(b) period, the finding of a violation of 8(a)(5) would have been barred. In that case, however, during the 10(b) period the Employer *refused several times to sign a contract which had been*

agreed upon. These refusals, in and of themselves, were a clear violation of the Act. Compare that to the present case where *nothing* did happen during the relevant period which would warrant a finding of bad faith because the absence of meetings was by *mutual consent,* the Company met with the Union *when requested,* and the Company offered a full contract proposal containing a *substantial wage* increase.

May the Trial Examiner's consideration of evidence subsequent to September 8, 1964, be utilized to sustain his and the Board's determination that the Company violated Section 8(a)(5) of the Act? The answer to that question is no. First, as has been demonstrated, the Trial Examiner and the Board concluded incorrectly and based solely upon events antedating the six-month limitation period of Section 10(b) that the Company had bargained in bad faith. Since that determination was incorrect and was clearly colored by and the result of events and acts antedating the limitation period, the Company would be prejudiced by an attempt to cure that erroneous determination by consideration at this time of events subsequent to September 3, 1964. Secondly, because he had determined that the Company had violated Section 8(a)(5) as of September 8, 1964, the Trial Examiner rejected the Company's defenses that the Union itself was refusing to bargain by its adamant position and the undisputed violence, mass picketing and vandalism which permeated and distorted the atmosphere of bargaining sessions subsequent to September 8, 1964 [R. 58-59].

Thirdly, the Trial Examiner prevented the Company from proving its allegation that Commissioner Haglund had been assisting the N.L.R.B., and failed to consider that Mr. Becker's good faith belief that because Commissioner Haglund was so acting, the negotiating sessions of December, 1964 and January, 1965 and thereafter were materially affected by the circumstances.

III.

Respondent's Constitutional Right to a Fair Hearing Was Denied When the Trial Examiner Refused to Compel Commissioners of the Federal Mediation and Conciliation Service to Appear, Testify and Disclose Information.

One of the most critical and contested procedural issues during the course of the hearing was whether or not the Company would be allowed to avail itself of the subpoena power of the N.L.R.B. in order to obtain evidence on its behalf [Tr. 636-675]. Although extended argument on the subject occurred during the hearing, points and authorities were filed on the point by Company, extended offers of proof were made by Company's counsel, the issue was raised in Company's Brief filed at the conclusion of the hearing before the Trial Examiner, and again before the Board, there is no reference in either the Intermediate Report of the Trial Examiner or the Decision of the Board as to the correctness of the ruling quashing the subpoenas which had been served upon Commissioners Grant Haglund and Jules Medoff of the Federal Mediation and Conciliation Service.

Commissioners Grant Haglund and Jules Medoff were served with subpoenas on November 1, 1965 requiring them to appear and produce their minutes in this matter on Wednesday, November 3, 1965 at 10:00 A.M. [R. Exh. 6(a) and (b)]. On November 4, 1965, Company telegraphed William E. Simkin, Director of the Federal Mediation and Conciliation Service, requesting permission for Commissioners Haglund and Medoff to appear, testify and disclose their minutes of the negotiations between MacMillan Ring-Free Oil Company and the Oil, Chemical & Atomic Workers of America, Local 1-128 which occurred at the offices of

the Federal Mediation and Conciliation Service during 1964 and 1965 [R. Exh. 6(f)].

On Friday, November 5, 1965 a telegram was received from the Federal Mediation and Conciliation Service denying Commissioners Haglund and Medoff permission to appear [R. Exh. 6(g)].

Neither of the Commissioners made an appearance at the hearings. The General Counsel for the Federal Mediation and Conciliation Service filed a Petition to Revoke Subpoenas, supported by points and authorities [R. Exh. 6(c) and (d)]. Points and authorities were also filed by Company in support of its position [R. Exh. 6(e)].

After an extended argument the Trial Examiner granted the Petition to Revoke Subpoenas [Tr. 669, 636-675]. At no juncture of the case, as revealed by the Petitioner's Brief, was there any issue that the Company had not complied with all procedural requirements to properly subpoena the mediators. The question was, and is, whether the Trial Examiner in quashing the subpoenas precluded the Company from having a fair hearing and the opportunity to properly defend itself against the allegations of the Complaint.

The two Commissioners of the Federal Mediation and Conciliation Service were subpoenaed by the Company for independent reasons. First, the Company subpoenaed Commissioner Jules Medoff to give testimony concerning statements of the parties which occurred during the meeting conducted under the auspices of the Federal Mediation and Conciliation Service on September 4, 1964. During the hearing extended testimony was elicited by all parties as to the conversations which occurred on September 4, 1965. The Company contended that Mr. Hunter of the Union had admitted before Commissioner Medoff that the Company had in fact on September 2, 1964 made an offer of a wage

increase of 4½% [R. 34]. The witnesses for the Union who testified at the hearing denied that Mr. Hunter had made such an admission [R. 34]. In his Intermediate Report, the Trial Examiner attempted to resolve the question presented by the conflicting testimony of the parties without having to find that either the witnesses for the Company or for the Charging Party had willfully misrepresented the conversation which occurred before Mr. Medoff [R. 34-36]. The issue of credibility is recognized by the Petitioner in its Brief (Pet. 41).

The Company contends however that because the Trial Examiner constructed his decision by making all of his findings dependent upon credibility of the respective witnesses, that the Company's constitutional right to a fair hearing were denied when it was unable to produce the one independent witness who could have testified whether Mr. Cody and Mr. Hunter were testifying truthfully during the hearing or whether they were in fact testifying untruthfully. If Mr. Medoff had been compelled to testify, and had testified as the Company contended he would, the Company would have been able to exonerate itself from accusations of the Government that it was not bargaining in a good faith manner and at the same time would have been able to cast serious doubt on the credibility of the Union negotiators' entire testimony as to all other points in dispute [Tr. 636-669]. In addition, as discussed *supra,* because the September 4 meeting was really the only event which occurred during the 10(b) period prior to September 8, 1964, the time as of which the Company was found to have refused to bargain; anything which occurred at that meeting would be important, particularly when described by a neutral party.

The Company subpoenaed Commissioner Haglund for two primary reasons. First, as the Company's

counsel stated to the Trial Examiner as an offer of proof, there was evidence that Mr. Haglund had cooperated with the National Labor Relations Board in its preparation of its case against the Company [Tr. 948-953]. The attorney for the Company stated in effect that if Mr. Becker were allowed to testify he would state he had been told by Commissioner Haglund that the latter had discussed the case with Miss Belle Karlinsky of the National Labor Relations Board and that upon a subsequent occasion Commissioner Haglund admitted that he had discussed the case both with Miss Karlinsky and the Regional Director of the National Labor Relations Board. If such was true, the Company had a right to review the records of the Federal Mediation and Conciliation Service to question Mr. Haglund concerning what information had been divulged to the National Labor Relations Board in order to determine whether or not the files contained evidence which would impeach or contradict evidence presented by the General Counsel.

Secondly, the testimony of Mr. Haglund was essential in order to explain the conduct of Mr. Becker during negotiating sessions conducted under the auspices of the Federal Mediation and Conciliation Service during the months of December, 1964, January, 1965, and thereafter. One of the extraneous factors which entered into the negotiations was Mr. Becker's determination that Mr. Haglund, by cooperating with the National Labor Relations Board and divulging information contained within his files, was no longer acting as a neutral conciliator but had removed himself from such a position and was now present at the negotiating sessions as an active proponent of the Union or the National Labor Relations Board [Tr. 194]. If the Company had been allowed to prove such during the hear-

ing, it could have explained in part why the negotiating sessions during the latter part of 1964 were not more fruitful.

In its argument to the Trial Examiner, the Federal Mediation and Conciliation Service relied upon Title 5, U.S.C. §22 as the primary statute upon which its claim of privilege rested [Tr. 641-646].

The Court specifically rejected a similar claim in *Harvey Aluminum (Incorporated) v. N.L.R.B.* (9th Cir. 1964), 335 F. 2d 749, 755:

> "The Board suggests that the 'housekeeping' regulations of the Departments of Justice and Labor afford no alternate ground for non-production. But such regulations are ordinarily construed as requiring only that the demand from production of agency documents be made upon the head of the agency rather than a subordinate employee, and the subpoenas which petitioners obtained were addressed to the Attorney General and the Secretary of Labor. Such regulations do not justify nondisclosure of their own force."
>
> *Harvey Aluminum (Incorporated) v. N.L.R.B.*, 335 F. 2d 749, 755.

See also:

United States ex rel. Touhy v. Ragen (1950), 340 U.S. 462 (especially Frankfurter J.'s concurring opinion at pp. 470-473), and

N.L.R.B. v. Capitol Fish Company (5th Cir. 1961), 294 F. 2d 868, 873, 875.

"5 U.S.C.A. § 22 cannot be construed to establish authority in the executive departments to determine whether certain papers and records are privileged. Its function is to furnish the departments with housekeeping authority. It cannot bar a ju-

dicial determination of the question of privilege or a demand for the production of evidence found not privileged. Had there been any doubt of this before, the doubt was removed by the amendment of 5 U.S.C.A. § 22 in 1958 making explicit the fact that the section does not itself create a privilege. This amendment added the sentence, 'This section does not authorize withholding information from the public or limiting the availability of records to the public.' 72 Stat. 547 (1958). As a matter of comity, courts frequently do not require disclosure of the evidence when the circumstances indicate that the records should be confidential; if the court wishes to scrutinize it to make sure, the evidence may be examined in camera. But the ultimate determination of the privilege remains with the courts."

N.L.R.B. v. Capitol Fish Company, 294 F. 2d 868, 875.

It is now clear that the determination of whether a document or testimony sought to be withheld by the Government under a claim of privilege is of such a nature that disclosure would be harmful to the public interest is a question for the courts and not for the executive branch of the Government.

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officials."

United States v. Reynolds (1953), 345 U.S. 1, 9-10.

"Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary—not in the party claiming the privilege and not in a party litigant."

N.L.R.B. v. Capital Fish Company, 294 F. 2d 868, 876.

See also:

8 Wigmore, *Evidence* (McNaughton Rev. 1961 pp. 809-810 and cases cited therein).

Recent cases have enunciated the principle that any right of the Government to withhold testimony or statements from a party must rest upon a recognized privilege. This Court so held in *General Engineering, Inc. v. N.L.R.B.* (9th Cir. 1965), 341 F. 2d 367:

> "It is true that a privilege purportedly created by Section 102.118 of the Board's rules and regulations, was claimed. The substance of this asserted privilege, as we have seen, is that all books and records of the Board, and all information which comes to a Board employee in the course of his official duties, is absolutely privileged unless the Board or general counsel consents to their production or release.
>
> "There are probably some court decisions which recognize a carte blanche 'privilege' of this kind. But, in view of section 10(b) of the Act, discussed above, and the last sentence of 5 U.S.C. § 22, discussed above, we believe that the claim must be particularized with reference to some generally recognized privilege accorded governmental agencies. Such, for example, are claims that the information sought would disclose confidential informants (Mitchell v. Bass, 8 Cir., 252 F.2d 513), state secrets (United States v. Reynolds, 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed 727), military secrets (United States v. Reynolds, supra), or mental processes of those engaged in investigative or decisional functions (United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429; Appeal of Securities & Exchange Commission, 6 Cir., 226 F.2d 501, 519). In the proceeding now be-

fore us no such privilege was either claimed or found to exist."

General Engineering, Inc. v. N.L.R.B., 341 F. 2d 367, 375.

Accord:

United States v. Reynolds (1953), 345 U.S. 1.

This is as it should be. Otherwise Federal executive officials will use "housekeeping" statutes as "a convenient blanket to hide anything Congress may have neglected or refused to include under specific laws." (*General Engineering, Inc. v. N.L.R.B.* (9th Cir. 1965), 341 F. 2d 367, 374.)

The broad privilege asserted here once again should be rejected by this Court.

A privilege may be created by the common law, by statute, or by regulation having the force of law in proper circumstances.

See:

8 Wigmore, *Evidence* (McNaughton Rev. 1961 pp. 798-804).

There is no common law privilege involved here. Neither has a privilege been created by legislation.[4]

Furthermore, even if a privilege exists, it would not be of the breadth asserted here. The statements in question were not confidential in nature, as they might be where one of the parties had explained the background of his position to a mediator. It does not add to the "trustworthiness" of the mediator for him to countenance either side's taking a false position, under oath, as to what actually occurred during a negotiating

[4]The regulation referred to in Petitioner's Brief is merely procedural, see above and *Rose v. Board of Trade of City of Chicago* (D.C.N.D. Ill., 1964) 35 F.R.D. 512, 515.

session. The mediator could not be accused of "taking sides" where he merely answers objective questions under subpoena as to matters of which he was witness. He cannot be accused of betraying the trust placed in him by the union if the statements to which he testifies were made, not to him in confidence, but openly to the Company.

Here the Charging Party and the Government introduced the conversations of all the parties before the mediators. Therefore, there was a complete willingness on their part to reveal all that occurred at those negotiations. Similarly, the only remaining party at those negotiations, the Company, wished to introduce additional testimony concerning those negotiations. This unique factual situation is quite distinct from the usual situation where the party initiating the action desires to introduce the testimony of a mediator over the opposition of the other party to the mediation sessions.

Petitioner, cites House Rept. 1497, 89th Cong., 2nd Sess. p. 10 as having some persuasive relevance to the issue presented in this case.

> "This exemption (of trade secrets and privileged or confidential commercial and financial information from the new 'public information' law) would assure the confidentiality of . . . disclosures made in procedures such as the mediation of labor-management controversies." (Pet. 39-40).

The quoted material focuses on *confidential disclosures of commercial and financial information.* The privilege claimed here is much broader. The statements here were not "disclosures" in the usual sense of the word. Nor were they "confidential." And they did not pertain to "commercial and financial information." The Company urges, moreover, that the passage of the new "public information" statute indicates a legislative in-

tent that the governmental agencies not be allowed to shield their files and witnesses from examination because of vague and artful claims of privilege.

In *Machin v. Zuckert* (D.C. Cir. 1963), 316 F. 2d 336, the U.S. Air Force asserted its military privilege as to an accident investigation report (see *United States v. Reynolds* (1953), 345 U.S. 1). The court correctly confined the assertion of privilege to information obtained through promises of confidentiality and required the Air Force to furnish independent "factual findings" and objective "conclusions."

It is elementary law that any privilege asserted by the Government must be strictly construed. Under Title 29, Chapter XII, Code of Federal Regulations, Part. 1401.5, regulating Federal mediators' compliance with subpoenas, a mediator is prevented from testifying with respect to matters coming to his knowledge in his official capacity. Under the facts of the instant case, Commissioner Haglund was acting outside the scope of his official capacity when he conferred with employees of the Board and actively cooperated with them in the preparation of the case against the Company.

Even if it is conceded, *arguendo,* that there exists a valid privilege, that privilege was clearly waived under the circumstances of the present case.

First, as to the testimony which might be obtained from Mr. Haglund, it was held in *Fireman's Fund Indem. Co. v. United States* (D.C. Fla. 1952), 103 F. Supp. 915, that the privilege is waived if a copy of a privileged document is placed in the hands of one of the parties. (See also *Federal Sav. & Loan Ins. Corp. v. First Nat'l Bank* (D.C. Mo. 1944), 3 F.R.D. 487.)

Here, where both the prosecutor and the witness are agencies of the same government and the witness has allegedly assisted the Government in preparing its case,

it would be grossly unfair to maintain that the privilege remain to shield the Government witness from impeachment.

Similarly, if Commissioner Medoff were an officer of the N.L.R.B., there would be no question but that the N.L.R.B. would have waived any privilege it might have with regard to his testimony.

> "Fundamental fairness requires that Capitol Fish be allowed to introduce testimony that may impeach the evidence offered against it. The NLRB cannot hide behind a self-erected wall evidence adverse to its interests as a litigant. 5 U.S.C.A. §22 does not call for a result so inimical to our traditions of a fair trial."
>
> *N.L.R.B. v. Capitol Fish Company,* 294 F. 2d 868, 875.

See also:

> *United States v. Beekman* (2d Cir. 1946), 155 F. 2d 580 (privilege waived where Government prosecutor in a criminal case possessed evidence bearing on the credibility of his witnesses).

The fact that the Commissioner is a member of a sister agency of the same Government has been held by this court not to affect the principle that, when the Government presents witnesses and relies upon their credibility, it must allow the opposing party access to potentially impeaching evidence which it may control. If it refuses to allow access to such evidence, it must lose the benefit of its witnesses. This is true even in noncriminal proceedings.

> *Harvey Aluminum (Incorporated) v. N.L.R.B.* (9th Cir. 1964), 335 F. 2d 749.
>
> "In a criminal prosecution the Department of Justice would scarcely be hard to say that it was

not required to produce statements otherwise within the rule simply because the documents rested in the hands of another federal agency and we perceive no valid distinction, for this purpose, between that case and this one. [B]ut the Departments of Justice and Labor are not sovereign, and though the Board may not be able to compel them to produce documents in their possession, the President or, if need be, the courts, may do so.

"The Board argues that the practical result of such a rule is that 'the Board must get the statements or lose the witnesses,' and this 'would leave the trial of Board cases at the mercy of the fortuitous coincidence of investigations conducted by this and other agencies—each concerned only with the administration of its laws.' This may well be true. An agency other than the Board, viewing the matter from its different vantage point, may conclude that the Board's interest in having the testimony of the witness is not as great as the agency's interest in maintaining the privacy of its files. If the view of the agency in possession of the witness' prior statement prevails, the Board's efforts to enforce its Act may be hampered. This would no doubt be unfortunate. But it would be less defensible still to resolve such agency disputes by permitting the Board to have the benefit of the testimony while denying the opposing party access to statements of the witness in possession of the government by which the testimony might be impeached."

Harvey Aluminum (Incorporated) v. N.L.R.B., 335 F. 2d 749, 754-755.

The Government, wearing one hat as a mediator, cannot be permitted to invoke a self-created and self-administered privilege and thereby sift the information

which it will release to the courts and thereby shield the Government, wearing another hat as prosecutor, from effective judicial control. This is particularly true where the alleged actions of Commissioner Haglund in revealing information to the N.L.R.B. removed the Federal Mediator and Conciliation Service from a "neutral" position to that of a prosecuting party.

IV.

The Company May Not Be Found to Have Violated Section 8(a)(5) as the Union Itself Was Bargaining in Bad Faith and/or Bargained in Such a Manner That Company's Good Faith May Not Be Measured.

The Board in other cases has recognized that one party's conduct in negotiations may not constitute a refusal to bargain if, in fact, the other party's conduct was not consistent with the obligation imposed equally upon it to bargain in good faith. If the conduct of the Union was such that it was not bargaining in good faith, no remedial order may issue against the Company even though there may be no formal charge pending against the Union at the time.

The rationale of such decisions is simple, clear and just: If the charging party was not engaging in bargaining so as to satisfy the dictates of the N.L.R.A. by itself bargaining in good faith, it is impossible for the Board to measure the conduct of the responding party. This rationale recognizes that the conduct of the responding party may only be determined to have been good or bad faith if all the surrounding circumstances are considered. One of the most important of these considerations is the conduct of the opposing party within the forum of negotiating sessions. Even before the National Labor Relations Act was amended in

1947 to make it an unfair labor practice for a union to refuse to bargain, the Board in *Times Publishing Company* (1947), 72 N.L.R.B. 676, stated that if the union itself is not bargaining in good faith a situation is presented whereby it is impossible to determine whether or not the employer has refused to bargain.

> "The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. *It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.*" (Emphasis added) *Times Publishing Company*, 72 N.L.R.B. 676, 682-683.

See also:

Superior Engraving Co. v. *N.L.R.B.* (7th Cir. 1950), 183 F. 2d 783 (Employer may not be guilty of refusal to bargain if union itself not bargaining in good faith);

Servette, Inc. (1961), 133 N.L.R.B. 132 (The Board recognized that a refusal to bargain on behalf of the union or the union's assuming an adamant position would constitute a defense);

Imperial Machine Corp. (1958), 121 N.L.R.B. 621;

American Brake Shoe Co. (1956), 116 N.L.R.B. 820, rev'd on other grounds, 244 F. 2d 489 (7th Cir. 1957). (Union conduct incompatable

with the atmosphre of reasoned bargaining and mutual trust, even though not constituting a refusal to bargain, so contributed to the failure of the parties to reach an agreement that the employer may not be held to have violated Section 8(a)(5));

Shannon & Simpson Casket Company (1952), 99 N.L.R.B. 430;

Harcourt & Co. (1952), 98 N.L.R.B. 892.

In fact the Union's conduct in the instant case is very similar to that described by the Board in *Central Minerals Co.* (1944), 59 N.L.R.B. 757.

> *"However, we wish to point out, obiter, that absent the factors comprising the total situation as outlined above, we would not have found that the respondent's failure to make detailed and specific counterproposals in itself constituted bad faith negotiations, for the Union's ultimatum—'We have one contract' and 'you can take it or leave it'—would have relieved the respondent of that duty since the Union's position made it clear that specific counterproposals would be unavailing."* [Emphasis added] *Central Minerals Co.,* 59 N.L.R.B. 757, 758-759.

Throughout the hearing, the Company contended that the Union's position of adamant rigidity fully justified, and was the reason for, the Company's bargaining position. The Trial Examiner gave the Company's position slight consideration. The Trial Examiner delved deeply into reasons for the Company's position, speculating as to the mental processes of the Company's negotiators, but, as demonstrated by his Intermediate Report, felt it unnecessary to devote any consideration to the Union's bargaining attitudes and positions. The Trial

Examiner's treatment of the record indicates his view of collective bargaining as a one-way street. We submit that even on the basis of the Trial Examiner's findings, and the Board's subsequent adoption thereof, there was sufficient evidence of the Union's refusal to bargain so as to explain why no agreement was reached by the parties.

First, it must be recognized that collective bargaining does not take place inside of a vacuum capsule insulated from the influences of the past and the day-to-day conduct of the parties and the realities of the industrial complex. Throughout the entire course of the negotiations from June 13, 1961, until the end of March, 1965, the presence of the 1960 collective agreement was a spectre which continued to haunt both of the parties and exerted a considerable influence on their bargaining positions. Without exaggeration it may be said the Union maintained a position that it would settle for no less than its provisions [R. 24-25, 27, see *infra.*]. On the other hand, the Employer maintained that there would have to be various modifications and changes in some of the provisions of the 1960 agreement [R. 25-26, 45, 49, See *infra.*].

Alomst without exception, at the negotiating meetings spanning a four-year period, the Union negotiators adamantly insisted on reinstatement of the 1960 agreement with agreed economic improvements. Specific demands for a return to the old provisions were made repeatedly, including in negotiations at the following bargaining sessions: June 22, 1961; January 2, 1963; November 12, 1963; September 2, 1964; September 4, 1964; November 6, 1964; January 12, 1965; January 21, 1965; and January 28, 1965 [Tr. 812-814]. Each time the Company made a new proposal or modification, the Union refused to make any concessions or counter-

offers, demanding adherence to the language of the 1960 agreement.

The following excerpts from Mr. Cody's own testimony illustrate the adamant, "take it or leave it," attitude of the Union.

"Q. During the course of negotiations in meeting after meeting, you did demand or you requested that the Company return to the old contract, the 1960 contract, is that right?

A. In the early part of the negotiations.

Q. Up until what stage, then, did you demand?

A. Until we made our counter-proposal to the Company on October 18, 1962 [Tr. 261, lines 13-21].

. . .

Q. What about November 1, 1963; did you demand a return to the old contract in that meeting?

A. 1963?

Q. Yes.

A. I think what I said was this: That we would return to the old contract; as amended because it had been amended then on wages, and this was my recollection of what I said about returning to the old contract.

Q. This is the only particular in which the old contract, in your opinion, had been amended, was on wages, is that right?

A. Up until 1963, up to November of 1963, yes.

Q. Did you also make the statement that you wanted to return to the old contract on September 2nd, 1964, at the meeting on that date?

A. The old contract, I said that I would like to return to the old contract as amended then by vacations and wages [Tr. 262, line 12, to 263, line 3].

. . .

Q. What about November 6, 1964; did you make the statement in negotiations?

A. In this way: That we would take the old contract, as amended by the vacation clause and the vacation agreement and the wages [Tr. 263, lines 16-21].

. . .

Q. Did you make the same statement in the meeting on January 28, 1965?

A. Yes. I asked that they put our last proposal into effect, which included those letter agreements, or put the old contract into effect as amended." [Tr. 264, lines 3-9].

. . .

Of course, a major demand of the Union was the union security clause. The following occurred during the testimony of Mr. Cody:

"Q. Did you ever say that a Union shop agreement was an essential part of any contract that you entered into?

A. Yes. [Tr. 271, lines 12-16].

. . .

Q. At no time throughout the negotiations have you at any time modified your position on the Union security clause as contained in your original agreement, is that right?

A. That is right." [Tr. 271, line 25, to 272, line 5].

This is supported by Mr. Becker who said:

"To the best of my recollection we discussed several articles and always the Union shop issue was present and the check-off was present, and these were discussed in light with the past discussions, the Union saying that they would have to

have this, they would not sign a contract without the Union shop or check-off.

And I asked them why they had to have it.

And they said they had to give the employees security.

And I said, 'What other reason?'

And they advanced none, other than they had it in the old contract and they were not going to negotiate back and they would not sign the labor agreement without the Union shop and the check-off in it." [Tr. 973, lines 2-16].

In fact, at the February 26, 1964 meeting, Mr. Becker recalled Mr. Cody threatened that the Union would strike unless the Respondent granted the Union shop and check-off.

"And if I remember right, he told me they had strike authorization and they were going to strike us.

"And I told him I regretted this, they shouldn't strike, we should continue to negotiate and continue to resolve our problems; we should continue to negotiat*ions*.[Sic]

"And he said the Company wasn't giving what they wanted and they were not getting any place and they wouldn't sign a contract unless it had Union shop and check-off in it and if he couldn't get these things and have an amendment of the wage proposal that we had agreed to put in effect in the amendment of the old contract, he was going to take strike action against us." [Tr. 899, lines 13-24].

The extreme adamancy of the Union, an attitude that it would give no quarter and conveying the idea that the Union position was "all or nothing" is further confirmed by the terms of its last written contract proposal

of March 1, 1965. Of the 45 provisions of the 1960 agreement, 37 were incorporated verbatim into the last proposal of the Union [R. 25; G.C. Exh. 3(f); Tr. 63; R. 27; G.C. Exh. 3(h); Tr. 111]. Of the six remaining provisions, the Union added a new clause which would have obligated the Company to pay severance pay, added a new vacation provision providing increased benefits, modified the grievance procedure from a 4 step to a 2 step, and increased the term of the agreement from one to three years. Thus, in the face of the Company's argument that the old agreement had not worked efficiently and satisfactorily, the Union demanded the old agreement in a form modified only to provide greater economic benefits to the employees. As summarized by Mr. Becker at the Hearing:

> "I told Mr. Cody that we had reviewed his proposal and found it substantially the same, the identical proposal that he had made, that had been in the old contract and except a very few changes that we had previously agreed to in negotiations, it was the same contract that he had asked for and had been asking for since 1960, absent certain monetary changes.
>
> "I stated that 'You have increased the economic demands on this. You have increased the wage rates. You have increased—not only do you want a pension plan, you want two, one called a pension plan, another called a future pension plan. Also our economic demands by asking for a severance pay provision, vacations, you have increased our costs in vacation,' and I went down each of these items and told Cody wherein he had submitted to us practically the same, identical old contract, with the exception that he had increased the cost, the economic cost." [Tr. 994, lines 2-18].

Thus, the evidence is without contradiction that the Union assumed a position on what would be an acceptable contract on June 22, 1961 and steadfastly refused to modify or change that position in one significant iota up to and including the last negotiating session which occurred on April 2, 1965. Such conduct itself makes the whole concept of collective bargaining a sham. *It is without argument that the Union desired the execution of an agreement, but similarly, it is without argument that the Union would only accept an argument on terms which it dictated.* The Trial Examiner [R. 57-58] and the Petitioner in its brief (Pet. 34 fn. 21) contend that although the Union wanted a contract (*its* proposal) the Company's aim was to frustrate the bargaining process. There is no evidence that the Company was less anxious to reach an agreement (albeit its proposal) than the Union and for this desire it cannot be faulted. In the face of the Union's obstinancy, to hold that the Employer failed to bargain is to hold that it was in bad faith because it did not capitulate to each and every of the Union's demands. Or, if not each and every demand, what demand would the Board contend it should have agreed to satisfy its duty? On the other hand, who can say what the result would have been if the Union had demonstrated a willingness to compromise?

In the situation presented by the instant case, where both parties put forward proposals which they rigidly adhered to, the evidence cannot sustain the finding that the Company failed to bargain.

V.

The Violence, Threats and Intimidation of the Pickets, Directed Toward the Company and Its Employees Suspended the Employer's Duty to Bargain From September 8, 1964 Until the Date of the Hearing.

The Trial Examiner found it convenient to completely disregard the Company's defenses that the violence and vandalism of the Union and employees suspended its duty to bargain and explained the positions which it took during the negotiating sessions after September 8, 1964. First, the Trial Examiner found that because the strike of September 8, 1964 was caused by the Company's refusal to bargain, the subsequent violence would not have suspended the Company's duty to bargain [R. 59]. Secondly, because its negotiating attitude was not significantly different after September 8, 1964, its negotiating positions were not "shaped" by any of the reports of misconduct it received during the strike [R. 58-59].

We submit that inasmuch as, as discussed, the Trial Examiner had no basis for determining that the Company had refused to bargain prior to September 8, 1964, his reasoning that the Company's duty to bargain was not thereafter suspended is erroneous. Additionally, the Trial Examiner's conclusion that he need not consider whether the Company's bargaining positions were affected by the violence because its proposals were not materially different after 1964 in effect imposes the burden of proof of its good faith upon the Company. *If the Company could not be held to have bargained in bad faith as of September 8, 1964 the mere fact that its proposals were not materially different after that time could certainly be explained by the misconduct of the Union and the employees, or the Company attributing such to the Union.*

As noted in the Statement, during the course of the Hearing, the Company placed into evidence, both by way of exhibits and direct testimony, numerous examples of the acts of intimidation, coercion, arson, recrimination and mass picketing, which the Company and its employees experienced from the inception of the strike through and including the Hearing in this matter. The Company was engulfed in an atmosphere of violence which permeated and discolored the atmosphere of all the bargaining sessions which occurred after October 1, 1964, at least through April 1, 1965.

On October 26, 1964, the Company deemed it necessary to file a Complaint for Injunction and Damages against the OCAW and the striking employees [R. Exh. 4]. On October 26, 1964, the Superior Court for the County of Los Angeles issued an Order to Show Cause and Temporary Restraining Order. On December 1, 1964, the Company and the Charging Party entered into a stipulation whereby the Charging Party agreed that its employees, representatives, officers, organizers and members would be enjoined and restrained from mass picketing, rock-throwing, shoving and kicking at or near the Company's plant [R. 41]. On December 1, 1964, the Superior Court isued the preliminary injunction [R. 41]. On March 9, 1965, after a trial the Court found that four of the Union pickets had willfully failed to comply with the preliminary injunction in that they had used violent, threatening and abusive language, shoved, kicked, tripped and came into contact with the Company's employees not on strike, and tempered with or touched or came into contact with the Company's pipeline valves or other equipment, and, therefore, they were adjudged to be in contempt of court [R. Exh. 4].

The Complaint for Injunction and Damages, as originally filed, contained the declarations of eleven em-

ployees of the Company. It is not necessary to reiterate the contents in this Brief of those declarations and it suffices to state that they were filled with alleged acts of vandalism, kicking of employees, following of employees at night from work, rock-throwing, and mass picketing. The Supplemental Declarations which were filed in February of 1965 similarly contained allegations of unlawful acts of the pickets which continued through the months of November and December of 1964 and January of 1965 [R. Exh. 4].

The continuing occurrences of bodily injury, intimidation, and threats to the employees were called to the attention of the Company's officials on a regular basis. The employees were instructed during the course of the strike to record all such acts upon a yellow legal pad which was hung in the still shack for that purpose [Tr. 681].

Mr. Cliff Cailland or Mr. Bruce May collected these daily reports and forwarded them to the Company's negotiators, Mr. Henry Becker and Mr. Earl Willoughby [Tr. 623].

In order to illustrate for the Trial Examiner and the Board the types of incidents which occurred to the working employees and their wives during the duration of the strike, the Company introduced into evidence the testimony of various employees. It is important to note that the testimony of these employees was illustrative only and did not purport to definitely cover the entire spectrum of types and numbers of incidents which were reported to the Employer.

Mr. and Mrs. Walter Warner testified to having received threatening and obscene phone calls late at night continuously after Mr. Warner's return to work at the Company's refinery up until just prior to the Hearing [Tr. 700]. In addition, Mr. and Mrs. Warner testified

that on November 16, a molotov cocktail bomb was thrown through their bedroom window narrowly missing killing two their children [Tr. 700, 713-714].

Mr. William Lehman testified that he had watched mass picketing at the plant during the month of October, that he had discovered four acts of vandalism directed toward the locks on the Company's gates, and that he had been threatened by the pickets on one occasion [Tr. 717, 721, 719]. Joe Hill testified that after he returned to work even as late as the middle of June, 1965 (four months after the comtempt convictions and only shortly before the complaint issued) someone fired a pistol at his automobile which shattered the glass by his head [Tr. 742]. On another occasion in July or August of 1965, Mr. Hill's tires were slashed, his air-conditioning hose was cut, the power brake line was cut and the fan belt ripped off his car [Tr. 743]. Mr. Alfred Bernard testified that he began employment with the Company on October 30, 1964 and that he experienced considerable difficulty crossing through the pickets to get to work between October 30 and December 25 of 1964 [Tr. 759]. On one occasion, Mr. Mixon, a picket, stamped on one of his feet and swore at him [Tr. 760]. On another occasion, Mr. Garrett, another picket, pushed him off the sidewalk and told him that his time was running out [Tr. 760-761]. On yet another occasion as he was riding his motor scooter home from work, Mr. Malloy, another of the pickets, drove approximately six inches behind him at thirty miles an hour [Tr. 762-763].

All of the employees above described the types of mass picketing which the Union engaged in at the premises of the Company. It is important to note that the activities which were reported to the Company, as having been authorized by or engaged in by the Charging

Party, did not cease with the issuance of the Temporary Restraining Order, nor with the issuance of the injunction, nor after the Contempt Hearing, but continued up to the date of the Hearing. Further confirmation of either the Union's active sponsorship of the activities or condonation of them is gleaned from Mr. Hunter's, one of the Union negotiators, admission that the Union failed to take any action against the employees who were found to be in contempt of court, allowing them to continue walking picket, *and the convicted employees' admissions that the Union paid their fines* [Tr. 1166, 1183, 1190].

It is the position of the Company that the conduct of the pickets and striking employees suspended its duty to bargain with the OCAW during the duration of the mass picketing and violence even though the Company in a continuing attempt to reach an agreement continued to negotiate during this period. As discussed *supra,* the Employer's negotiators were made aware of the continuing activities of the Union, its agents and the striking employees by the daily reports of the working employees [Tr. 820, 860, 1025-1029]. In such a situation as is present in the instant case, the Board has recognized that it is impossible to ascertain whether an employer is bargaining in good faith and, therefore, the employer's obligations to the union are held in abeyance until such activities cease. The duty to recognize and bargain with a union is suspended during such time as the union is engaged in conduct incompatible with fair dealing.

In *Kohler Co. and Local 833* (1960), 128 N.L.R.B. 1062, *rev'd on other grounds,* 300 F. 2d 699, *remanded* 148 N.L.R.B. 147 (1964), the Board held that the employer was justified in breaking off negotiations on June 29 to August 5 and between August 16 and

September 5 and was not guilty of a refusal to bargain as the union had encouraged the coercion and intimidation of the non-striking employees.

> "The Board also finds, for reasons expressed by the Trial Examiner, that the Respondent was further justified in breaking off collective bargaining negotiations on August 18. We agree that the evidence shows the Union encouraged the continuation, spread, and enlargement of the home demonstrations by its publicity campaign, and that the home demonstrations constituted coercion and intimidation of the non-striking employees.
>
> "Accordingly, in view of the foregoing, and on the basis of the entire record, we find that the Respondent was not guilty of a refusal to bargain in good faith at any time between June 29 and August 5, or between August 18 and September 1."
>
> *Kohler Co. and Local 833,* 128 N.L.R.B. 1062, 1087-1088.

As articulated by the Board in the *Kohler* decision, no refusal to bargain charge may be based upon the employer's attitude at the bargaining table when the union abdicates its legitimate role as bargaining representative for the employees by espousing or sanctioning mass picketing, violence and other illegal activities.

Whether or not there was sufficient evidence introduced during the Hearing to establish that the Union officials were directly responsible for the violence, it suffices that the Company received information which led it in good faith to believe that the incidents were attributable to the Union, its agents, and the striking employees [Tr. 848, 852-853, 873, 876, 881, 883]. We do, of course, submit that the extent, nature, and continuation of the activities gives rise to more than a

reasonable inference that the Union did not seek to prevent the acts or was merely passive. This is confirmed by the fact that the contempt fines were paid by the Union.

It is difficult to conceive how an argument could be made with any validity that the public policy expressed by the National Labor Relations Act could be furthered by the Board's ordering an employer to bargain with a union and its members which were engaged in acts of the manner and kind present in the instant case. Any such holding would mean that, in addition to the legitimate economic weapons available to the union within the context of collective bargaining, the stamp of approval of a governmental agency would be given to a union's unlawful activities engaged in to obtain concessions from an employer.

> "In view of the well-settled rule that an employer's duty to bargain is suspended while a union is engaged in unprotected activity, we are constrained to find that Lantinga was under no obligation to speak with the Union while it was engaging in such threats. *Were we to hold otherwise, we would be encouraging the use by unions of threats of unlawful and unprotected action to force concessions from an employer.* Such a result would be contrary to the policy objectives of the Act. Accordingly, we find that under the above circumstances Lantinga's refusal was privileged and in no way violated the Act." (Emphasis added).
>
> *Valley City Furniture* (1954), 110 N.L.R.B. 1589, 1592, enf'd 230 F. 2d 947 (6th Cir. 1956).

As succinctly stated by Justice Frankfurter in *N.L.R.B. v. Insurance Agents' International* (concurring opinion) (1960), 361 U.S. 477, 506:

> "Unlawful violence, whether to person or livelihood, to secure acceptance of an offer, is as much a withdrawal of included statutory subjects from bargaining as the 'take it or leave it' attitude which the statute clearly condemns. One need not romanticize the community of interest between employers and employees, or be unmindful of the conflict between them, to recognize the utilization of what in one set of circumstances may only signify resort to the traditional weapons of labor in another and relevant context offend the attitude toward bargaining commanded by the statute." (*N.L.R.B. v. Insurance Agents' International,* 361 U.S. 477, 506).

The testimony introduced at the Hearing was without contradiction to the effect that the Company was continually influenced by the Union's history of "quickie strikes", vandalism and violence. Both negotiators of the Company were entirely familiar with the three strikes called by the local Union in 1960 and 1961 and the resultant damage and vandalism which accompanied them [Tr. 848, 852-853, 873, 876, 881, 883]. The Trial Examiner, found that the International Union was the representative of the employees rather than the local Union as alleged in the Complaint and referred to by the parties. Nevertheless, because the Company's state of mind is all determinative, it suffices that the Company's negotiators thought they were dealing with the local Union and realized they would be dealing with the local Union on a day to day basis.

> "I explained also we felt the International Union was a good Union, but the Local Union was ir-

> responsible and the conduct of the persons belonging to the Local Union caused us not to want to enter into a Union shop agreement with the Union." [Tr. 891, lines 6-10].

Similarly, it is without dispute that both Mr. Willoughby and Mr. Becker were constantly aware of the incidents of arson, following of employees, mass picketing, assault, and vandalism which occurred on a regular basis from the inception of the September 8, 1964 strike until the date of the Hearing, almost one year later.

Mr. Willoughby testified that he received and read regular reports of the employees and supervisors from the refinery as to these incidents [Tr. 820, 860]. These reports were also sent to Mr. Becker [Tr. 1025-1029]. Both Mr. Willoughby and Mr. Becker testified that the incidents were always a factor, and on some particular provisions of proposals a major factor, which persuaded the Company to ask the Union for modifications from the 1960 agreement [Tr. 817, 820, 825, 829, 848-854, 860, 875-876, 883, 890, 893, 934, 938, 982, 1028, 1031, 1032, 1046, 1049, 1054, 1062-65, 1067, 1086].

The Union's predisposition to strike and the related activities were always considered by the negotiators for the Company, and they were the major backdrop in front of which the negotiations took place. As melodramatic as it may sound, the incidents of the past strikes and the present strike was the setting for the negotiations, a setting which was of such a nature that the *dramatis personae* could not separate themselves from it.

> "Well, the Union's conduct on the picket line, the violence was engaged in, the necessity for obtaining a court injunction, the contempt of that court injunction, this all figured into this back-

ground, this history. This all is part of the negotiations. It is difficult to isolate out any particular thing and say, 'Is this affected in this way, this conduct?' It happens it is there. It cannot be forgotten, and it is always present, so regardless of the situation—" [Tr. 1086, lines 18-25].

Further supporting the bona fides of the Company is the fact that the relations with another union were amicable and the collective bargaining agreement contained provisions such as a union shop which the Company did not agree to in the negotiations with the Charging Party [G..C Exh. 3(bb)]. The difference in relations was the responsibility of the Oil Workers, or rather the difference existed because of their lack of responsibility. The record shows instead of union discrimination a recognition and appreciation by the Company of the character of the Union and the need, borne out by the event, to bargain accordingly. It was not a refusal to bargain attitude which prompted and guided the Company but a prudent and careful approach fully justified by prior and current actions of the Union.

Conclusion.

A fair reading of the credible and relevant evidence reveals that at worst the instant case involved nothing more than good, hard bargaining by the Company with the added fillips that the Company was faced for four years with rigid demands by the Union and inundated for a one-year period by violence, vandalism, mass picketing and employee intimidation.

Furthermore, the Board's Decision and Order relating 8(a)(5) violation is not supported by any evidence, let alone substantial evidence. Nothing occurred during the 10(b) period prior to September 8, 1964 to sup-

port a finding that the Company was not bargaining in good faith. To enforce such an order would allow the Board to literally read Section 10(b) out of the Act.

Furthermore, the Company was denied a fair hearing because it was not permitted to call and question the two federal mediators. To permit the government to prosecute the Company without allowing it access to witnesses and information which might exculpate it is contrary to all recent cases and must not be permitted.

For the reasons stated, it is respectfully submitted that with regard to the 8(a)(5) aspect of the Board's Order, the Petition for Enforcement must be denied.

Dated: November 9, 1967.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLARD Z. CARR, JR.

No. 21,918

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E-Z DAVIES CHEVROLET, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 83-95),[2] issued on November 30, 1966, against respond-

[1] The pertinent statutory provisions are reprinted in Appendix B, *infra* pp. 28-30.

[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References

ent (hereafter also the "Company"). The Board's decision and order are reported at 161 NLRB No. 121. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding is part of the record before the Court pursuant to Section 9(d). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Redwood City, California, within this judicial circuit. No jurisdiction issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with a union which had been duly elected and certified as the bargaining representative of an appropriate unit of the Company's employees. The facts underlying the Board's findings are set forth below.

A. *The representation proceeding*

The Company is a new and used car-truck dealer in Redwood City, California. On June 21, 1965, the

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designated "Tr." are to the reporter's transcript of the testimony in the underlying representation proceeding as reproduced in Volume II of the record. References designated "B.X." or "E.X." are to exhibits of the Board and respondent, respectively, submitted in the representation proceeding. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Union [3] filed an election petition seeking to represent a bargaining unit comprised of the Company's salesmen (R. 4). At the pre-election hearing, the Company moved to dismiss the election petition on the ground that the single-employer unit was inappropriate. The Company asserted that the only appropriate unit in which the salesmen could be represented was a multiemployer unit consisting of all salesmen employed by the employers in an employer association of which the Company was a member (Tr. 6). The following facts were developed at the hearing: [4]

The Company is a member of Peninsula Automobile Dealers Association ("PADA") and the California Association of Employers ("CAE"). Since 1953, PADA (through CAE conducting negotiations on PADA's behalf) has bargained and contracted with Lodge No. 1414 of the International Association of Machinists [5] as the representative of a multiemployer unit consisting of the mechanics and repairmen employed by the Company and other members of PADA. Since 1953 PADA has similarly bargained with Local

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[3] Professional Automobile Salesmen, Drivers and Demonstrators, Local No. 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] The Union had also filed election petitions to represent, in separate single-employer units, two additional members of the association, namely, Carl Simpson Buick, Inc., and Fairway Chevrolet. The three petitions were consolidated for hearing and decision (R. 5). All three employers, represented by the same counsel, moved to dismiss the respective petitions on the unit ground set forth above.

[5] Peninsula Auto Mechanics Lodge No. 1414, International Association of Machinists.

No. 665 and Local No. 576 of the Teamsters Union,[6] as bargaining representatives of the remaining shop employees of PADA's members (R. 14; Tr. 6-21, 24-31, E.X. 1-6).

In 1953, also, Local 775 of the Retail Clerks Union [7] was designated as the bargaining representative of the salesmen employed by the Company and other members of PADA. This bargaining relationship, however, expired when no collective bargaining contract could be agreed upon. In 1958, Local 576, Teamsters, who, as shown above, represents part of the shop employees, was designated as the bargaining representative of the salesmen employed by PADA's members. Again, however, PADA and the salesmen's representative could reach no collective bargaining agreement. Thus, when the Union filed the instant election petition to represent the Company's salesmen in a single-employer unit, neither they nor other salesmen employed by PADA's other members had ever been covered by a multiemployer contract between PADA and any labor organization (R. 14; Tr. 22-23).

On the basis of these facts,[8] the Regional Director determined that the Company's salesmen constitute an

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[6] Garage & Service Station Employees' Union, Local No. 665, International Brother of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and, Automotive Workers Union, Local No. 576, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[7] Local 775, Retail Clerks International Association, AFL-CIO.

[8] Other evidence introduced at the pre-election hearing bore on questions of individual employee unit inclusion, which are no longer in issue.

appropriate bargaining unit; he rejected the Company's contention that the Company's salesmen could be appropriately represented only in a multiemployer unit comprised of the salesmen of all PADA members. Accordingly, the Regional Director denied the Company's motion to dismiss the petition, and directed an election in a unit comprised of the Company's salesmen (R. 13-16). The Company filed a Request for Review with the Board, which denied the request on September 3, 1965, thereby affirming the Regional Director (R. 17-26).

The salesmen selected the Union (R. 27). The Company filed objections seeking to set aside the election. The Company asserted that the Union's use of an election observer, who was a Union official and also an employee of another employer, prevented a free election (R. 28-29). The Regional Director conducted an administrative investigation of the Company's objection, which showed the following:

The Union selected Wallace L. Banner, Jr. as its election observer. Banner is an elected vice-president of the Union, and receives $50.00 per month for expenses but no salary. Banner is a full-time automobile salesmen employed by an automobile dealer in San Francisco whose salesmen are represented by the Union. The Board agent conducting the election permitted Banner to serve as the Union's observer over the Company's opposition. No claim was made that Banner engaged in any improper conduct during the polling; he wore no insignia other than his official

observer's badge; he did not speak to the voters during the election (R. 30-31).

On the basis of the above facts, the Regional Director concluded that Banner's performance as the Union's observer did not prevent a free election, and overruled the Company's objection. Accordingly, the Regional Director certified the Union as the representative of the Company's salesmen (R. 31-33). The Company filed a Request for Review with the Board (R. 34-38), which was denied on January 24, 1966 (R. 41). A request for reconsideration was also denied (R. 43-44, 46).

B. *The unfair labor practice proceeding*

When the Union sought recognition and bargaining, the Company refused, and did not reply to the last of the Union's several requests (R. 39-40, 42, 45, 47). The Union then filed charges, and a complaint issued alleging refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Company answered, in the form of a general denial of the commission of unfair labor practices (R. 48-49). As no issues had been raised requiring a hearing before a trial examiner, the General Counsel moved the Board to grant summary judgment against the Company. Orders were granted transferring the proceeding to the Board and directing the Company to show cause, in writing, why the motion for summary judgment should not be granted (R. 60-74). The Company filed a response in which it asserted that the Board had no authority to grant a motion for summary judg-

ment, and could not rule on the complaint until after a hearing and the opportunity to call witnesses and introduce evidence (R. 76-81).

II. The Board's Conclusions and Order

The Board granted the motion for summary judgment, holding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and to bargain with the Union after it had been duly elected and certified as the bargaining agent in an appropriate unit comprised of the Company's salesmen. The Board rejected the Company's assertion that it was improperly being denied an evidentiary hearing on the complaint. The Board noted that the Company refused to recognize the Union in order to obtain court review of the election and certification, and that in such circumstances it is well settled that issues which were or could have been raised in the representation proceeding may not be relitigated in the unfair labor practice proceeding, unless the employer has newly discovered or previously unavailable evidence to introduce. The Company offered no such evidence. Accordingly, a hearing on the complaint was not required and, the Company having admittedly refused to recognize the certified representative of a unit of its employees, summary judgment was proper (R. 82-91).

The Board's order directs the Company to cease and desist from the unlawful conduct found, to bargain with the Union upon request, and to post the usual notice (R. 91-95).

ARGUMENT

The Board Properly Found That Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Recognize and to Bargain With a Union Which Had Been Duly Elected and Certified as the Bargaining Representative of an Appropriate Unit of Respondent's Employees

The Company's conceded refusal to recognize and to bargain with the Union, after it was elected by the Company's salesmen and certified by the Board, violated Section 8(a)(5) and (1) of the Act unless, as the Company asserts, the election and certification were invalid. We show below that this assertion has no merit. We further show that the Board did not commit any procedural error in granting the General Counsel's motion for summary judgment.[9]

A. *The Board properly found that the Company's new and used car-truck salesmen constitute an appropriate bargaining unit*

Section 9(b) of the Act provides that "the Board shall decide in each case whether, in order to secure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for collective bargaining shall be the employer unit,

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[9] As set forth, *supra* p. 3 n. 4, in a consolidated representation proceeding three elections were held; in two, the employees of the Company and Carl Simpson Buick, Inc., selected the Union. Simpson asserts error in the representation proceeding and in a subsequent unfair labor practice proceeding on the identical grounds raised by the Company. *N.L.R.B.* v. *Carl Simpson Buick, Inc.*, No. 21887. After filing of briefs the Board will move for consolidation of the cases for argument.

craft unit, plant unit, or subdivision thereof" (*infra* pp. 28-29). Before the Board the Company made no contention that its automotive salesmen do not constitute a distinct, homogenous group which traditionally has been held an appropriate bargaining unit. See *Lownsbury Chevrolet Company*, 101 NLRB 1752; *Weaver-Beatty Motor Co.*, 112 NLRB 60; *N.L.R.B.* v. *McCarthy Motor Sales Co.*, 309 F. 2d 732, 733 (C.A. 7). In finding such a unit permissible here, the Board applied its oft-repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate. *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929-930 (C.A. 2), enforcing 110 NLRB 2156, 2160; *Bull Insular Line, Inc. et al.*, 107 NLRB 674, 682; *Pearl Brewing Co.*, 106 NLRB 192, 193; and see *Joseph E. Seagram & Sons*, 101 NLRB 101, 103. The Board properly rejected the Company's claim that, nonetheless, its salesmen could only be represented as part of a multiemployer unit.

Unit determinations are particularly within the responsibility and wide discretion of the Board. The agency's unit direction is "rarely to be disturbed" (*Packard Motor Co.* v. *N.L.R.B.* 330 U.S. 485, 491), and "will not be set aside in the absence of a showing that such determination was arbitrary and capricious." (*N.L.R.B.* v. *Merner Lumber Co.*, 345 F. 2d 770, 771 (C.A. 9), cert. denied, 382 U.S. 942). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110-111 (C.A. 9); *N.L.R.B.* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517, 519-520 (C.A. 7). Arbitrariness

and capriciousness in the instant case, asserted the Company, are shown by the following factors (see R. 17-26): the Company is a member of an association of automobile dealers (PADA) in the greater San Francisco area, which is authorized to bargain collectively for its members; during the last 15 years the Board has certified unions to represent the members' shop employees in multiemployer units; PADA has bargained with these unions on a multiemployer basis and entered into associationwide collective bargaining agreements on behalf of the Company and other members; when the Union filed its election petition to represent the Company's salesmen in a single-employer unit, there were current multiemployer agreements covering the shop employees; and, during this 15 year period the Board successively certified two unions as the representative of the members' salesmen in a multiemployer unit, albeit on each occasion the bargaining relationship did not subsist for failure of PADA and the union to agree to a contract covering the salesmen (see *supra* pp. 3-4).[10]

The above factors, however, scarcely demand a conclusion that the Company's salesmen may now exer-

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[10] The Company's salesmen have apparently been allowed to participate in a health and welfare program set up in a trust agreement negotiated between PADA and unions representing shop employees in multiemployer units (R. 21-22; Tr. 30, E.X. 5). The Company put misplaced reliance on this factor. The voluntary extension of employment benefits to employees outside a multiemployer unit bears little on unit considerations and may not control the Board's unit determination. See, *N.L.R.B.* v. *Friedland Painting Co.* 377 F. 2d 983, 987 (C.A. 3).

cise the right to bargain collectively only if grouped in a multiemployer unit. The Company's insistence on the inappropriateness of single-employer bargaining was premised on the past and current history of multiemployer bargaining concerning other employee groups. This history, however, does not automatically crystallize the bargaining pattern for *all* of the employees of the Company and other PADA members. The collective bargaining history of the particular employees sought to be represented is the central relevant factor. It is well within the Board's discretion to permit single-employer bargaining for the unrepresented employees of employers who otherwise participate in multiemployer bargaining. *N.L.R.B.* v. *American Steel Buck Corp.*, *supra*. Compare, *N.L.R.B.* v. *Local 210, Teamsters*, 330 F. 2d 46 (C.A. 2). A different result was not dictated here by the two occasions during which the Company's salesmen were unsuccessfully represented on a multiemployer basis. The Board, in furtherance of employee rights, looks for a *successful* bargaining history. Here, as in *Lownsbury Chevrolet Company*, *supra*, a "sporadic history of multiemployer bargaining for the salesmen [does not] render the [single-employer] unit sought inappropriate (101 NLRB at 1754). Moreover, the Company's salesmen were unrepresented when the Union filed its petition. The unions who once represented the salesmen did not choose to be involved in the election proceeding. Cf. *N.L.R.B.* v. *David Friedland Painting Co.*, *supra*, 377 F. 2d at 987. Hence, the Company's assertion of a *controlling* bargaining

history which should not be disrupted is without merit. "It is well settled that a single-employer unit is presumptively appropriate, and that to establish a claim for a broader unit a controlling history of collective bargaining on a broader basis by the employers *and the union involved* must exist." (emphasis supplied.) *Chicago Metropolitan Home Builders Association*, 119 NLRB 1184, 1185; *John Breuner Co.*, 129 NLRB 394, 396.

The cases cited by the Company support no other result. In 1953, as shown, the Board held that the salesmen employed by PADA's members could, like their other employees, be grouped in a multiemployer unit. But the Board adhered to the principles set forth above and applied here. Thus in 1953 the Board directed the multiemployer unit since the petitioning union had obtained the requisite showing of organizational interest among salesmen throughout PADA; the union was willing to represent the salesmen on the broader basis. The Board distinguished cases where "the only union seeking to represent the employees involved sought to represent them on a single-employer basis." *Peninsula Auto Dealers Association, et al.*, 107 NLRB 56, 58. See *N.L.R.B.* v. *Local 210, Teamsters*, *supra*, 330 F. 2d at 47-48. Multiemployer bargaining requires the consent of both union and employer, and in situations where the only union involved does not agree to represent employees on that basis it will not be required to do so. See, *Chicago Metropolitan Home Builders Association*, *supra; Cab Operating Corp., et al.*, 153 NLRB 878, 879-880. Ac-

cord: *Harbor Plywood Corp., et al.*, 119 NLRB 1429, 1432; *Detroit Newspaper Publishers Association* v. *N.L.R.B.*, 372 F. 2d 569 (C.A. 6). This is the situation now, in contrast to 1953 when the petitioning union was qualified and agreed to represent PADA's salesmen in a multiemployer unit. The Board, accordingly, found that the single-employer unit sought was appropriate.

The Board, of course, must re-assess prior unit determinations upon a timely election petition.[11] Had the Board, as urged by the Company, refused to recognize the propriety of a single-employer unit of these employees, and insisted that in order to become eligible for representation they must first re-organize in a unit embracing the salesmen of every other employer-member of PADA, the practical effect would have been to deny the Company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act" (Section 9(b), *supra*). For, "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants." *Joseph E. Seagram & Sons, Inc.*, *supra*, 101 NLRB at 103.

The Company put equally misplaced reliance on *The Los Angeles Statler Hilton Hotel*, 129 NLRB 1349, where the Board denied the union's request for single-employer units comprised of employees currently excluded from an existing multiemployer unit rep-

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[11] See, e.g., *Thalhimer Brothers, Inc.*, 93 NLRB 726, 727; *United Mine Workers, District 50* v. *N.L.R.B.*, 234 F. 2d 565, 568 (C.A. 4).

resented by another union. The Board determined that the unrepresented employees of each employer lacked "any internal homogeneity [or] cohesiveness" and, therefore, did not comprise appropriate separate bargaining units. The Board expressly distinguished cases like the instant one, where existing multiemployer bargaining for other groups of employees does not bar "single-employer units . . . composed of categories of employees such as guards, office clerical employees, and [*automotive*] *salesmen*, categories which have an internal homogeneity and cohesiveness and could therefore stand alone as an appropriate unit." (emphasis added). 129 NLRB at 1351. Cf. *Crumley Hotel, Inc., d/b/a Holiday Hotel, et al.*, 134 NLRB 113, 115-116.

The Company asserted (R. 21-22) that, particularly in view of the prior finding that a multiemployer unit was appropriate, the Union was seeking a narrower unit based on its organizing success and, therefore, the Board's unit finding was "controlled" by extent of organization within the proscription of Section 9(c)(5) of the Act. (see *infra* p. 29). It may be assumed, however, that the scope of organization was a predicate for the Union's unit selection. This would not establish that the Board's unit finding was controlled by the organizational factor. As stated by this Court in rejecting this contention: "Section 9(c)(5) . . . precludes the Board only from giving controlling weight to extent of organization. . ." *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110 n. 1 (C.A. 9); see also, *Metropolitan Life Ins. Co.* v.

N.L.R.B., 328 F. 2d 820, 822 (C.A. 3), vacated on other grounds, 380 U.S. 523; *The Board and Section 9(c)(5): Multilocation and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 Harvard Law Review 811, 824-825 (1966). Assuming, furthermore, that the multiemployer unit urged by the Company might still be appropriate, this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a "more" or "most" appropriate unit. "It is not unusual for there to be more than one 'appropriate' unit. The Board may choose from among several appropriate units" (*N.L.R.B.* v. *Local 19, IBL*, 286 F. 2d 661, 664 (C.A. 7), cert. denied, 368 U.S. 820) and the grant of the narrower unit requested of itself raises no issue of improper reliance on extent of organization. *N.L.R.B.* v. *Smith*, 209 F.2d 905, 907 (C.A. 9); *General Instrument Corp.* v. *N.L.R.B.* 319 F.2d 420, 423 (C.A. 4), cert. denied, 375 U.S. 966. Accord: *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 406 (C.A. 9), cert. denied, 348 U.S. 887. If, as here, the unit is otherwise appropriate, it is not rendered inappropriate merely because it coincides with the extent to which a union has organized. In short, here, as in the past, the Board applied the settled principle "that the Act does not compel a labor organization to seek representation in the most comprehensive grouping unless such grouping constitutes the *only* appropriate unit." *The Wm. H. Block Company*, 151 NLRB 318, 320.

Moreover, the Board may consider the fact that no labor organization is currently seeking a broader unit as an additional, and determinative, ground for permitting the narrower unit sought when, as in this case, that unit meets the relevant criteria for appropriateness. Section 9(c)(5) does not preclude consideration of the union's organizational interest where more than one unit is appropriate. The section was only intended to prohibit unit determinations which "could only be supported on the basis of extent of organization . . . [and] was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442; *N.L.R.B.* v. *Moss Amber Mfg. Co.*, *supra*, 264 F. 2d at 111; *N.L.R.B.* v. *Sun Drug Co.*, 359 F. 2d 408, 412 (C.A. 3); *Texas Pipe Line Co.* v. *N.L.R.B.*, 296 F. 2d 208, 213-214 (C.A. 5).

In the election proceeding the Company also asserted (R. 22-24) that here, as in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, *supra*, an issue of unauthorized reliance on extent of organization is raised by an alleged failure of the Board to explicate adequately the basis of its unit determination. *Metropolitan* involved the Board's application of a new policy, adopted after 15 years of contrary practice, which permits bargaining units of insurance agents less than statewide or companywide in scope. The Supreme Court concluded that the Board had inconsistently applied the new policy in several cases

without sufficiently giving reasons for the disparate application. The Court remanded on the ground that in these circumstances lack of explication precluded a determination of whether permissible weight had been placed on extent of organization. Here, however, the Board, noted, *inter alia*, the undisputed fact that the Company's salesmen comprise an appropriate bargaining group and, citing previous decisions, the Board's long-settled practice of not denying employees the usual right to single-employer bargaining merely because other groups of the employer's employees are represented on a broader basis (R. 14-15). In sum, the Board, as we have shown, followed unit standards consistently applied in its previous decisions. It was not incumbent upon the Board to explicate further the statutory basis for standards so well recognized. As the Supreme Court held in *Metropolitan*, "Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies . . . so long as the basis of the Board's action, in whatever manner the Board chooses to formulate it, meets the criteria for judicial review" 380 U.S. at 443 n. 6. See, *N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 412; *S.D. Warren Co.* v. *N.L.R.B.*, 353 F. 2d 494, 498-499 (C.A. 1), cert. denied 383 U.S. 958. Accord: *American President Lines Ltd.* v. *N.L.R.B.*, 340 F. 2d 490, 492 (C.A. 9).

B. *The Board properly held that an employee of another employer who was a union official could act as the Union's election observer*

As shown *supra* pp. 5-6, the Union was permitted to select a union official, who was an employee of another employer, as its election observer. The Company's election objection asserting that this prevented a free election was properly rejected.[12] It is well settled that an election need not be set aside on a showing that the union's observer was an employee of another employer, and a paid union official or organizer. *N.L.R.B.* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433, 434 (C.A. 5); *Shoreline Enterprises* v. *N.L.R.B.*, 262 F. 2d 933, 938, 942 (C.A. 5); *N.L.R.B.* v. *Zelrich*, 344 F. 2d 1011, 1015 (C.A. 5). Of course, special circumstances, e.g., improper electioneering, by such observers may prevent a free election. But as the Board noted, the Company made no claim of this nature (R. 28-38). Rather, the Company simply equated the selection of a union official with instances where the Board has not permitted supervisors of the employer to act as election observers. To be sure, the Board's general policy is to prohibit both the union and the employer from using the employer's supervisory personnel as observers. The equation which the Company makes, however, was rejected in the above-

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[12] The Company asserted that the Board's summary affirmance of the Regional Director's decision overruling the election objection lacked the necessary explication. (R. 43-47). This contention has no merit. *N.L.R.B.* v. *Schill Steel Products*, 340 F. 2d 568, 574 (C.A. 5); *N.L.R.B.* v. *Air Control Products*, 335 F. 2d 245, 251 n. 26 (C.A. 5).

cited cases. The courts have thus agreed that generally a union spokesman may be distinguished from managerial officials, for the latter's immediate power to alter working conditions raises a risk of subtle pressures during the voting process. The cases cited by the Company illustrate this distinction. See, *R.R. Donnelly & Sons Company*, 15 LRRM 192 (personnel manager who interviewed applicants for employment and resolved employee grievances); *Harry Manaster & Brothers*, 61 NLRB 1373 (same); *The Union Switch & Signal Company*, 76 NLRB 205, 211 (attorney for employer); *Parkway Lincoln-Mercury Sales, Inc.*, 84 NLRB 475 (no exceptions filed to Regional Director's finding that employer's vice president should not have acted as observer); *Herbert Men's Shop Corp.*, 100 NLRB 670, 671, 674-676 (managerial executive who represented employer in negotiations and resolved employee grievances); *International Stamping Co., Inc.*, 97 NLRB 921, 922-923 (president's son and sister-in-law, who improperly left voting area and checked off names of employees as they went to vote); *Peabody Engineering Co.*, 95 NLRB 952 (employer's attorney).[13]

The Supreme Court early made it clear that in representation proceedings, "the control of the elec-

[13] The Board's practice, however, of not permitting persons closely identified with management to act as observers is not applied with the rigidity the Company suggests. The practice, for example, does not require invalidating an election where, even though the observer was a supervisor, his position in the employer's hierarchy and all the circumstances did not suggest management influence at the polls. *Plant City Welding & Tank Co.*, 119 NLRB 131, 132.

tion proceeding and the determination of the steps necessary to conduct the election were matters that Congress entrusted to the Board alone." *N.L.R.B.* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226. The Company fell far short of meeting the burden of showing that the Board in the instant case abused its wide degree of discretion. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *Foreman & Clark, Inc.* v. *N.L.R.B.*, *supra*, 215 F. 2d at 409; *International Telephone & Telegraph Corp.* v. *N.L.R.B.*, 294 F. 2d 393, 395 (C.A. 9).

C. *The Board properly rejected the contention that summary judgment against the Company was improper*

As set forth *supra* pp. 3, 5-6, as required by the Act, the parties were accorded a pre-election hearing on such matters in dispute as the appropriate unit, and the Company was provided review by the Board of the Regional Director's unit determination. The Company's post-election objection was overruled by the Regional Director after the usual investigation; the Regional Director was affirmed on review by the Board. The Company made no charge, as it could not, that this latter procedure was improper. The election objection raised solely the propriety of a union official, an employee of another employer, acting as an observer. No contention was even made that this issue involved any factual dispute (R. 28-29, 34-35). Under long-approved principles, post-election issues are decided after administrative investigation, unless the objecting party can affirmatively show that substan-

tial and material issues of fact have been raised which can only be resolved at a hearing. "[T]he Act [does] not require such a hearing" (*N.L.R.B.* v. *J. R. Simplot*, 322 F. 2d 170, 172 (C.A. 9)), which is often requested solely as a " 'dilatory tactic . . . by employers or unions disappointed in the election returns . . .' " (*N.L.R.B.* v. *Sun Drug Co., supra*, 359 F. 2d at 414).

In order to obtain review of the representation determinations, the Company refused to recognize the election and certification. Upon the initiation of the complaint proceeding to test the certification, however, the representation and unfair labor practice proceedings "are really one" (*Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 158), and the Board need not permit relitigation of issues determined at the election stage absent a showing of newly discovered or previously unavailable material evidence. *Pittsburgh Plate Glass, supra*, 313 U.S. at 161-162. The Company made no such showing: its answer constituted a general denial of unlawful conduct (R. 58-59); its response to the order to show cause why summary judgment should not be granted merely contained an allegation that the Company "intends, as part of its defense, to offer at the hearing additional evidence which would bear upon its defense" (R. 75-76, 78). No offer was made of any specific evidence. The Company did "not suggest what new facts a hearing would develop or what if any evidence would be produced." *N.L.R.B.* v. *J. R. Simplot, supra*, 322 F. 2d at 172, quoted with approval: *N.L.R.B.* v.

National Survey Service, Inc., 361 F. 2d 199, 205 (C.A. 7); *Macomb Pottery Co.* v. *N.L.R.B.*, 376 F. 2d 450, 453 n. 4 (C.A. 7); *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (C.A. 6). This Court has recognized that, " 'If . . . an issue is to be relitigated in a subsequent unfair labor practice proceeding once it has been canvassed in a certification proceeding it is up to the party desiring to do so to indicate in some affirmative way that the evidence offered is more than cumulative.' " *N.L.R.B.* v. *Hadley, Inc.*, 322 F. 2d 281, 286 (C.A. 9). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co., supra*, 264 F. 2d at 107; *N.L.R.B.* v. *Tennessee Packers, Inc., supra*, 379 F. 2d at 179-180; *N.L.R.B.* v. *Douglas County Electric Membership Corp.*, 358 F. 2d 125, 129-130 (C.A. 5).

The Company, moreover, made little attempt to show that, despite its admitted refusal to recognize the Union, the Board could not find a violation of Section 8(a)(5) and (1) of the Act and enter a bargaining order upon which this Court could properly review the representation determinations. The gravamen of the Company's argument is that the Board has no authority to enter the order by way of a summary judgment. However, as in the federal district courts, the Board's summary judgment procedure "separate[s] what is formal, or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to the burden of trial." 6 Moore, *Federal Practice*, para 56.15 (a) p. 2332 (2d. Ed.), quoting *Richard* v. *Credit*

Suisse, 242 N.Y. 346, 152 NE 110 (Cardozo, J.) An "opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, [is not] entitled to a . . . [trial] on the basis of a hope that such evidence will develop at the trial." 6 Moore *Federal Practice*, para. 56.15(3), p. 2343-2344. As stated by the Third Circuit (*N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 415-416):

> Nor is an evidentiary hearing required to permit a party to ascertain whether there is a substantial and material question of fact or to focus attention on its view of the factual situation which has already been developed.

For, "due process does not require an evidentiary hearing as a prerequisite to a valid determination of a question of law." *N.L.R.B.* v. *Sun Drug Co., Inc.*, *supra*, 359 F. 2d at 415. As the Company's answer and its response to the motion for summary judgment established no evidentiary issue, the direction of a hearing "would serve only to permit argument which could as well [be] presented in the [response] itself." *N.L.R.B.* v. *National Survey Service*, *supra*, 361 F. 2d at 205.[14] Furthermore, using summary procedure serves an important statutory purpose by expeditously resolving the choice of bargaining repre-

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[14] In *Russell-Newman Mfg. Co.*, 158 NLRB 1260, the General Counsel's motion was denied only after the employer offered to adduce specific new evidence contrary to the facts found by the Regional Director in the representation proceeding. As shown, the Company made no such offer, and the Board held that *Russell-Newman* has no application here (R. 78, 86).

sentatives: "Time is a critical element in election cases." *N.L.R.B.* v. *Sun Drug Co., supra,* 359 F. 2d at 414.

The courts have, accordingly, uniformly approved the use of summary judgment in the circumstances presented here. *Acme Industrial Products, Inc.* v. *N.L.R.B.*, 373 F. 2d 530 (C.A. 3), enforcing *per curiam*, 158 NLRB 180; *Neuhoff Bros. Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611, 613 (C.A. 5), cert. denied, 386 U.S. 956; *N.L.R.B.* v. *Tennessee Packers, Inc., supra,* 379 F. 2d at 176-177, 179-180; *N.L.R.B.* v. *National Survey Service, Inc., supra,* 361 F. 2d at 202, 208; *Macomb Pottery* v. *N.L.R.B., supra* 376 F. 2d at 452; *N.L.R.B.* v. *Jordan Bus Co.*, 380 F. 2d 219 (C.A. 10), enforcing 153 NLRB 1551. See 1 Davis, Administrative Law, Section 7.01 at 411 (West, 1958).[15] The courts have rejected the contention (see R. 76-77) that summary procedure is precluded by Section 10(b) of the Act, which provides that an unfair labor practice complaint shall be considered upon a hearing. As stated by the Seventh Circuit, "[Section] 10(b) cannot logically mean that an evidentiary

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[15] In *N.L.R.B.* v. *KVP Sutherland Paper Co.*, 356 F. 2d 671 (C.A. 6) the court held that in the circumstances relitigation of a unit determination should have been permitted and that summary judgment was improperly granted. In the court's view the employer had made a timely showing of a substantial and bona fide change in operations since the representation case which, as the Board has recognized, may warrant reconsidering a unit determination in the complaint proceeding. The Company made no such contention.

hearing must be held in a case where there is no issue of fact." *Macomb Pottery Co.* v. *N.L.R.B.*, *supra*, 376 F. 2d at 477.[16]

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[16] The court in *Macomb* also rejected the argument (R. 76) that the Act contains no express authority for a summary judgment procedure and that, in any event, the procedure must be formulated by the Board's issuance of a formal rule. The Board's rules provide generally for pre-hearing motions (see, 29 C.F.R. Sec. 102.24) and that procedure was followed here. Cf. *N.L.R.B.* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 764 (C.A. 8); *N.L.R.B.* v. *Peter Weber and Local 825, International Union of Operating Engineers, AFL-CIO,* —— F. 2d —— (C.A. 3), No. 16396, August 28, 1967 (66 LRRM 2049). Moreover, the motion for summary judgment plainly may, as here, be addressed to the Board directly. The Board is the decision making authority. See, *Warehousemen and Mail Order Employees, Local 743* v. *N.L.R.B.*, 302 F. 2d 865, 866, 869 (C.A.D.C.); 2 Davis, Administrative Law, Section 10.02 at 6-11 (West, 1958). While the Board usually delegates to a trial examiner the authority to conduct the proceeding and issue a recommended decision, the Board may consider the complaint directly (Section 10(b) and (c) of the Act, *infra*, p. 29; see also, 29 C.F.R. 102.50). The Company's claim to a right to a "Trial Examiner's decision" (R. 77, 85) is, in short, wholly without foundation. *N.L.R.B.* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3). Compare, *Utica Mutual Life Insurance Co.* v. *Vincent*, 375 F. 2d 129, 132 (C.A. 2), cert. denied, —— U.S. ——.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(2)(f) of the Rules of this Court:

(Page references are to the stenographic transcript in Board Case No. 20-RC-6458, 20-RC-6462, and 20-RC-6463)

Board Case No. 20-CA-4016

Exhibits	For Identification	In Evidence
Board's:		
Nos. 1(a) through 1(h)	5	6
Employer's:		
No. 1	12	13
No. 2	13	14
No. 3	14	17
No. 4	17	18
No. 5	18	21
No. 6	21	22

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Representatives and Elections

* * * *

[Sec. 9] (b) The Board shall decide in each case whether, in order to assure to employees the fullest

freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint . . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . .

* * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE; 1967 278524 299

No. 21918

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E-Z DAVIES CHEVROLET,
Respondent.

Brief for Respondent

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No. 21918

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STATEMENT OF THE CASE

Respondent adopts the basic statement of the case set forth in the Board's brief, pp. 2-7, subject to the additions contained in the body of this brief, and with the following exceptions. The Regional Director's administrative investigation (Board brief, p. 5-6), was conducted on an *ex parte* basis, without opportunity for the company to appear, offer evidence, cross-examine witnesses, or inspect other evidence relied on by the Regional Director. And the Board's statement that "no issues had been raised requiring a hearing before a trial examiner" (Board brief, p. 6) pre-judges one of the major questions at issue here, i.e.,

whether a material and substantial issue of fact was presented requiring a hearing on the merits. NLRB Rules & Regs. § 102.69, 29 C.F.R. § 102.69.

SUMMARY OF ARGUMENT

In selecting a unit of salesmen employed only at Respondent's place of business as "the appropriate unit" for purpose of collective bargaining, the Board relies upon the fact that no contract had ever resulted from collective bargaining on a multi-employer basis; that no union was then seeking to represent these salesmen in a multi-employer unit; and that "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants" (Board brief, p. 13). Although charged with the duty to select the appropriate unit "in each case" by § 9 (b) of the National Labor Relations Act (hereinafter "Act"), 29 U.S.C. § 159 (b), the Board also relies upon its rule that "absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate" (Board brief, p. 9).

The Board gave little or no weight to the following factors supporting a multi-employer unit. Respondent is and was a member of Peninsula Auto Dealers Association (hereinafter "PADA"), a 50-member association comprising automobile dealerships in the southern San Francisco Peninsula area, which had bargained collectively with union representatives of all employees, including salesmen, since 1953. On two previous occasions the Board—and on one occasion a sister local of the union here involved—determined that the multi-employer unit for the salesmen was appropriate. All PADA salesmen were covered by a health and welfare plan under the same organization administering a similar plan agreed upon between PADA

and union representatives of the remaining employees. The Board also refused to recognize that "unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with management's ability to run its business," and that " 'there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization.' " *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 500 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967).

In view of the circumstances here presented, the Board's reliance upon relative union strength and position in making the unit determination conclusively demonstrates that it acted "arbitrarily and capriciously" in selecting the single-employer unit, *NLRB v. Merner Lumber and Hardware Co.*, 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965), and that its decision was "controlled" by the extent of union organization in contravention of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). The Board's use of its "presumption" that single employer units are appropriate "adds nothing." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 501.

Although the Board should not now be allowed to cause further delays and expense to Respondent, this matter must, at the very least, be remanded to the Board for further proceedings in view of the lack of articulated bases for its unit decision. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-444 (1965).

The Board certification of the Union was improper, since it was based upon an election invalidated by the presence of a non-employee Union observer. The Board's policies specifically provide that "observers *must* be non-supervisory employees of the employer." [Emphasis supplied]

National Labor Relations Field Manual § 11310 (July, 1967 ed.). The Board has often stated that election proceedings must be conducted under "laboratory conditions," *General Shoe Corp.,* 77 NLRB 124, 126 (1948), and it, accordingly, has set aside elections where persons closely identified with the employer acted as observers. See cases cited in Board brief, p. 19. The Board has determined that, in such cases, a showing of actual interference with the free choice of any voter is "of no moment." *International Stamping Co., Inc.,* 97 NLRB 921, 923 (1951).

Since the Board must not discriminate between employers and unions in this regard, *Southwestern Elec. Service Co. v. NLRB,* 194 F.2d 939, 942 (5th Circuit 1952), since the presence of a non-employee union official acting as an observer is inherently restrictive upon the free choices of voters, since the employer made timely objection to the observer's presence, and since no rational explanation was offered or is apparent to excuse the Union's failure to select a non-supervisory employee as its observer, enforcement of the Board's order should be denied.

The Board's use of summary judgment in entering its order against Respondent renders its order unenforceable since the use of summary procedure is not authorized in, and is impliedly prohibited by, the Administrative Procedure Act, 5 U.S.C. §§ 554 (c), 556 (d), as well as by the National Labor Relations Act, 29 U.S.C. § 160 (b), and the Board's own Rules and Regulations, 29 C.F.R. §§ 102.24-102.92.

Assuming, without admitting, that the non-employee observer's presence at the election is itself insufficient to set aside the election, and even if the agency may utilize summary procedures in an unfair labor practice proceeding, it was nevertheless error to do so here. The Regional

Director's *ex parte* administrative investigation itself revealed substantial and material issues of fact as to voter intimidation by the Union observer. The Board relied upon his report in rendering its order without giving Respondent an opportunity to appear, argue, inspect evidence and cross-examine witnesses as required by due process of law and the Board's own rules. *NLRB v. Bata Shoe Co.,* 377 F.2d 821, 825, 826 (4th Cir. 1967), cert. denied, ... U.S. ....., 88 S.Ct. 238 (Oct. 23, 1967); *NLRB v. Capital Bakers, Inc.,* 351 F.2d 45, 50-52 (3rd Cir. 1965); NLRB Rules & Regs. § 102.69.

Argument

THE BOARD'S PETITION FOR ENFORCEMENT OF ITS ORDER DIRECTING RESPONDENT TO BARGAIN WITH TEAMSTERS' LOCAL NO. 960 SHOULD BE DENIED SINCE THE DETERMINATION OF THE APPROPRIATE BARGAINING UNIT, THE ELECTION AND SUBSEQUENT CERTIFICATION OF THE UNION, AND THE SUMMARY PROCEDURE USED BY THE BOARD WERE ALL IN VIOLATION OF GOVERNING LAW.

Since the unit determination, election and certification of the Union, and the summary judgment procedure exercised against Respondent were contrary to law and in excess of the Board's authority, Respondent's refusal to bargain with Teamsters' Local 960 did not constitute a violation of § 8 (a) (5) and (1) of the Act, 29 U.S.C. § 158 (a) (5) and (1).

A. In View of the History of Prior Bargaining on a Multi-Employer Basis, Previous Board-Approved Multi-Employer Unit Determinations, and the Existence of a Health and Welfare Plan Covering all Salesmen Within the Multi-Employer Unit: (1) the Multi-Employer Unit Was the Only Appropriate Unit for Purposes of Collective Bargaining; (2) the Board's Single-Employer Unit Determination Was "Arbitrary and Capricious"; and (3) the Board's Unit Determination Was "Controlled" by the Extent of Union Organization in Contravention of Section 9(c)(5) of the National Labor Relations Act.

While it is true, as pointed out by the Board, that the Board's determination of the appropriate unit for collective bargaining is "rarely to be disturbed," *Packard Motor Company v. NLRB,* 330 U.S. 485, 491 (1947), such a determination cannot be "arbitrary and capricious," *NLRB v. Merner Lumber and Hardware Co.* 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965). Moreover, § 9 (c) (5) of the Act provides:

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section, the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159 (c) (5).

Respondent contends that the Board's unit determination in this case was both arbitrary and capricious, and was "controlled" by the extent to which the petitioning union had succeeded in organizing the employees of Respondent.

The acting Regional Director found that Respondent was engaged in the retail sale and service of new and used cars and trucks; that Respondent was a member of PADA, which since 1953 had bargained with Lodge 1414, International Association of Machinists, and Teamsters Union Locals 576 and 665 as representatives of PADA employees other than salesmen; that Local 775 of the Retail Clerks International Association was designated as representa-

tive of all the PADA salesmen in 1953 pursuant to a Board-ordered election; and that in 1958 Teamsters' Local 576 was designated as the salesmen's representative within the same multi-employer unit, although no collective bargaining contract ever ensued which covered the salesmen (R.14)[1].

Although not mentioned in the Regional Director's decision, the following facts were also established. PADA is comprised of approximately 50 car and truck dealerships located on the San Francisco peninsula and bounded by Daly City on the north and Mountain View to the south *(Peninsula Auto Dealers Assn. etc.,* 107 NLRB 56 (1953); Tr. 57-58). Since 1949, the California Association of Employers has been the bargaining agent for PADA. Each member of PADA agrees in writing to be bound by the terms of any bargaining agreement made by California Association of Employers with the approval of a majority of PADA's members (E.X.4; Tr. 18, 26-27).

In 1953, the Board granted the Retail Clerks' petition to represent all of the salesmen employed by PADA members, over an intervener union's objection that only single-employer units were appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. In 1958, the Board approved a stipulation entered into between PADA and Teamsters' Local 576, which designated all salesmen employed by PADA members as the appropriate unit (Tr. 10, 22). Therefore, while no contract was agreed upon as a result of the negotiations, collective bargaining between PADA and union representatives of the salesmen took place in 1953, and again in 1958.

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1. References designated "R." are to Volume I of the record. References designated "Tr." are to the reporter's transcript of testimony taken at the representation proceeding, Volume II of the record. References designated "E.X." are to exhibits of Respondent in the representation proceeding.

Also not mentioned in the Regional Director's decision was the fact that in August of 1963 a declaration of trust was entered into by PADA, Lodge 1414 of the International Association of Machinists, and Teamsters' Locals 576 and 665, covering a health and welfare program administered by the Motor Car Dealers Association of Northern California; and that all PADA salesmen were, at the time of the hearing, covered by a health and welfare plan administered by the same association (E.X.5; Tr. 19-20, 29-30).

In the face of these uncontroverted facts, the Board first seeks to justify its single-employer unit determination by referring to its "oft repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single employer unit is presumptively appropriate" (Board brief, p. 9). *NLRB v. American Steel Buck Corp.*, 227 F.2d 927, 929-930 (2nd Cir. 1955), the only court decision cited by the Board for this proposition, upheld a unit determination on the basis that "the record, as a whole, amply supports the Board's findings of fact." 227 F.2d at 929. No reference was made, expressly or impliedly, to any presumption employed by the Board. Perhaps some deference may be due to the Board's formulation of policies within the realm of its peculiar "expertise," but to canonize this policy without regard to the particular circumstances of the case is to contravene § 9 (b) of the Act which provides that "The Board shall decide *in each case*" the appropriate unit for the purposes of collective bargaining. [Emphasis supplied] 29 U.S.C. § 159 (b).

The indiscriminate use of such presumptions has been justly criticized. Note, *The Board and § 9(c)(5); Multi-location and Single-location Bargaining Units in the Insurance and Retail Industries,* 79 Harv. L. Rev. 811, 826-828 (1966). And the Supreme Court has recently denied certio-

rari in *NLRB v. Purity Food Stores, Inc.* 376 F.2d 497 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967), a case denying enforcement of a Board order under circumstances remarkably similar to those involved here, in which the Circuit Court stated that "The Board's simple declaration that single . . . units are considered 'presumptively appropriate' adds nothing . . ." 376 F.2d at 501.

The Board next seeks to avoid the importance of the now 15-year multi-employer bargaining history for all of the remaining employees of PADA members. It simply asserts its discretion to permit single-employer bargaining for certain employees, despite the presence of a larger bargaining unit in which other employees are represented.

But, while not invariably controlling, the bargaining history for one group of employees has been considered "persuasive" in determining the "question of appropriateness for every other group of employees." *NLRB v. Local 210, International Brotherhood of Teamsters, etc.,* 330 F.2d 46, 47 (2d Cir. 1964). And Board decisions have repeatedly noted the importance of this factor. See, e.g.: *Los Angeles Statler Hilton Hotel,* 129 NLRB 1349 (1961); *Joseph E. Seagram & Sons, Inc.* 101 NLRB 101 (1952); *Lone Star Producing Co.,* 85 NLRB 1137 (1949).

Moreover, the Board has consistently recognized the great importance of the same employee group's prior bargaining history in determining whether a multi-employer or single-employer unit is appropriate. See, e.g.: *NLRB v. Moss Amber Mfg. Co.,* 264 F.2d 107, 111 (9th Cir. 1959); *Travelers Ins. Co.,* 116 NLRB 387 (1956); *Berger Bros. Co.,* 116 NLRB 439 (1956); *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB 101. But the Board seeks to deprecate the fact that the salesmen within the PADA jurisdiction were represented by unions on a multi-employer basis first

in 1953 and again in 1958. It contends that this collective bargaining history is irrelevant because no bargaining contract was ever agreed upon between the PADA and the representative unions, in spite of their negotiations. The Board refines its rule to require a "successful" bargaining history, i.e., where formal collective bargaining contracts have been forthcoming.

Although the Board is charged with the duty of securing employee rights, it is not charged with the duty of seeing that every employee is covered by a formal contract, or of seeing to it that employee representatives are placed in the best possible bargaining position. See: *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 265 (1940); *NLRB v. West Texas Utilities Co.,* 214 F.2d 732, 740-741 (5th Cir. 1954). The Board's function is circumscribed by the Act, and, in determining the appropriate bargaining unit:

> "Consideration . . . should also be given to the consequences to employees similarly situated who apparently do not wish to unionize, but who would inevitably be affected, basically, by the union's activities . . . We believe, also, that there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization. Congress' appreciation of these factors we believe is evidenced by its passage of Section 9(c)(5) to the effect that the extent of organization is not the sole consideration." *NLRB v. Purity Food Stores, Inc.,* 354 F.2d 926, 931 (1st Cir. 1965). See Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 833 ff.

On remand, the Board itself "said that it was 'mindful' that unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with

management's ability to run its business," and that it was in "complete agreement" with the principle that "there should be some minimum consideration given to the employer's side of the picture." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 500.

In addition to the absence of a "successful" bargaining history, the Board points to the fact that no union is seeking to represent the salesmen on a multi-employer basis. It argues that in order to give the company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act," 29 U.S.C. § 159 (b), the single-employer unit must be found appropriate because "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants," citing *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB at 103 (Board brief, p. 13). This marshalling of factors in support of the Board's unit determination is the clearest example of the correctness of Respondent's contention that the Board's unit determination was "controlled" by the extent of organization in violation of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). Factors used in the Board's unit approach here—the successful bargaining history requirement, the absence of a competing union, and the so-called recognition of union inability to organize large units—are all factors which are immediately or ultimately derived solely from the fact that the union has succeeded in organizing employees on a single dealership basis, while it apparently failed to do so on a multi-employer basis as did its sister local in 1958 and the clerk's union in 1953.

In *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965), the Court approved the statutory test set forth by the National Labor Relations Board in its Twenty-Eighth Annual Report, page 51 (1963), as follows: "Al-

though extent of organization may be a factor evaluated, under Section 9 (c) (5) it cannot be given controlling weight." 380 U.S. at 442 n. 4. The interpretation to be given to the phrase "controlling weight" was set forth in the House Report on §9 (c) (5), which explicitly stated that although "The Board may take into consideration the extent to which employees have organized, this evidence should have little weight." H.R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947), quoted in Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 820.

Indeed, *NLRB v. Botany Worsted Mills,* 133 F.2d 876 (3rd Cir. 1943), one of the decisions criticized by the House of Representatives as being "controlled" by the extent of union organization, Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. at 821, is analogous to the situation involved here. There, the Board had approved a unit consisting of only one department in a plant. *Botany Worsted Mills,* 27 NLRB 687 (1940). In enforcing this Order, the Court of Appeals cited the Board's reasons for its determination, which are essentially those here advanced by the Board, stating:

> "The evidence before the Board showed that at the time a majority of the sorter-trapper group manifested its desire for collective bargaining through union membership, the majority of the other employees of Botany did not belong to any union and that no labor organization had petitioned the Board for certification as the representative of the employees on a plant wide basis. The Board expressed the belief that the rights of the unit selected as appropriate should not have to be contingent upon what other employees in other parts of the plant did. There was evidence indicating that the unit designated was suffiently distinct from other groups of employees so as to make its selection as a separate unit feasible. The sorters or

> trappers worked in a part of the plant entirely or partly set apart from the process in which they are engaged and this department has its own supervisors. There is no interchange of employees engaged in sorting or trapping, except to the extent that when the process was changed 12 former sorters were transferred to other departments. We do not see any basis upon which the designation of the bargaining unit by the Board in this case should be interfered with by this Court." 133 F.2d at 880-881.

If, as the Board apparently now contends, it is precluded from weighing extent of organization in determining an appropriate unit *only* when it is the *sole* basis for the unit determination, the Board will have effectively succeeded in subverting the purposes of § 9(c)(5). The Board considers numerous other factors in determining the appropriate unit. Included, *inter alia,* are the employer's form of business organization, the history of labor relations, the form of present or past organization, eligibility of membership in the organization, employee desires, employee mutual interests, multi-employer organization and *modus operandi,* geographical distribution, and bargaining custom in the industry. Respondent submits that it would be a very rare case indeed in which one or more of these other factors, however insignificant they might be under the circumstances, could not be found to support a unit determination which in fact is based primarily upon the extent of union organization. See, generally: Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. 811; CCH Labor Law Course ¶¶ 2075-2086.

On page 15 of its brief, the Board states that, assuming the multi-employer unit to be appropriate, "this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a 'more'

or 'most' appropriate unit." The Board's brief apparently suggests that the Board is therefore bound by § 9(c)(5) only in determining whether a unit is "an" appropriate unit, and that it is not so bound in choosing "from among several appropriate units." This contention requires a strained and unnatural reading of the statute. The duty of the Board is to select *the* appropriate unit in each case, Act § 9(b); 29 U.S.C. § 159(b), and it is this determination alone which establishes the ultimate bargaining relationship of the parties. To impute an intent on the part of Congress not to apply § 9(c)(5) in the ultimate determination of the unit finds no basis in reason, legislative history, or the language of the Act.

Moreover, the absence of an articulated statement by the Board that its decision is determined by the extent of union organization is clearly immaterial in considering whether its decision was, in fact, so controlled. See *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 442 (1965), vacating and remanding *Metropolitan Life Ins. Co. v. NLRB,* 327 F.2d 906, 909-911 (1st Cir. 1964).

Respondent, therefore, contends that the Board has not only chosen an inappropriate unit in this case and that its determination is "arbitrary and capricious", but that it has acted in derogation of § 9(c)(5) under any of the tests of "controlling" which can reasonably be supported in light of the language and legislative history of that section. All but one of the arguments advanced by the Board to justify its unit determination are based upon the extent of Union organization; the remaining "presumption" favoring single-employer units "adds nothing". The factors favoring a PADA association-wide unit need not be repeated. And perhaps the most telling fact compelling denial of enforcement here is that in 1953 the Board rejected the demand

of Teamster Local 111 for a single unit, and designated the association-wide unit as appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. See *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137, 141, (10th Cir. 1967). Since 1953, the only changed circumstances which have arisen, exclusive of the extent of union organization, is the history of collective bargaining by representatives of the salesmen on a multi-employer basis on two separate occasions, and continued bargaining on that basis for all other employees of PADA members.

At the very least, this matter should be remanded to the Board for further proceedings in view of the lack of articulated bases for its decision. In *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965), Justice Goldberg, writing for the Court, noted that the Board stated the grounds for its unit determination as follows:

> " 'The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding . . ., we found that each of the Employer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining . . . [W]e find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit.' " 380 U.S. at 442 n. 5.

The Supreme Court went on to state, at pp. 442-444:

> ". . . due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177, 197."

Both here and in *Metropolitan Life,* the Board failed to adequately explain its departure from prior decisions. In the instant case, the Board's articulated reasons for its decision fall far short of the expressed bases on which the Board rendered its order in the *Metropolitan Life* case, and which the Supreme Court found wanting. But here, the Board has had ample opportunity to review its decision following the publication of the Supreme Court's opinion in *Metropolitan Life.* It should not now be allowed to revise and restate its Order, thereby causing further delays and expense. Compare *NLRB v. Purity Food Stores, Inc., supra,* 354 F.2d 926 (remand to Board), with *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d 497 (enforcement denied). As stated by Justice Douglas in his dissenting opinion in *Metropolitan Life,* 380 U.S. at 444:

> "A reading of the court's opinion reveals the fallacies on which the Board proceeded. The employer sought review of the Board's Order, asking that it be set aside. Concededly it should be. But we need not act as amicus for the Board, telling it what to do. The Board is powerful and resourceful and can start over again should it wish . . . Neither of the parties asks for a remand. They are willing to stand or fall on the present record; and we should resolve the controversy in that posture."

B. The Election Was Invalid Since the Board Allowed a Non-Employee Union Officer to Act as the Union's Observer Contrary to the Board's Own Rules, and Over Respondent's Timely Objection.

Over Respondent's objection at the pre-election conference, the Union was permitted to designate as its election observer a Union official who was not an employee of the Company (R. 31).

The Rules and Regulations and Statement of Procedure of the Board provide, in § 102.68, that "any party may be represented by observers of his own selection, subject to such limitations as the Regional Director may prescribe." 29 C.F.R. § 102.68. Section 11310 of the National Labor Relations Field Manual (July, 1967 ed.), made available to the public by the Public Information Act, P.L. 90-23, 81 Stat. 54 (1967), states that "observers *must* be non-supervisory employees of the employer, unless a written agreement by the parties provides otherwise." [Emphasis supplied]. The failure of the Board to conform to its own standards in this respect is particularly glaring in light of its affirmation that:

> "Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *Sewell Manufacturing Co.,* 138 NLRB 66, 70 (1962);

and that

> "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

> It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault . . ., or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." *General Shoe Corp.,* 77 NLRB 124, 126 (1948).

It is true that the cases cited by the Board support its position that the use of an employee observer who is also a paid union official or organizer will not be deemed sufficient in and of itself to void an election (Board brief, p. 18). But these cases do not, as stated by the Board, have any bearing upon whether a *non-employee* union official may properly act as a watcher at the election polls. All of the decisions cited by the Board involved union observers who were in fact employees of the employer. *NLRB v. Zelrich,* 344 F.2d 1011, 1014-1015 (5th Cir. 1965) (recently fired employee subject to reinstatement because of employer unfair labor practice in his dismissal); *Shoreline Enterprises of America,* 114 NLRB 716, 718-719 (1955) (employee), enforcement denied, *Shoreline Enterprises of America, Inc. v. NLRB,* 262 F.2d 933 (5th Cir. 1959); *Huntsville Mfg. Co.,* 99 NLRB 713, 730 (1952) (employee), enforced *NLRB v. Huntsville Mfg. Co.,* 203 F.2d 430 (5th Cir. 1953). In fact, the Board has refused to overturn a Regional Director's decision precluding the use of non-employee union observers, even where the union was unable to secure volunteers from among the employees. *Jat Transportation Corp.,* 131 NLRB 122, 125-126 (1961).

It is also true, as pointed out by the Board (brief, pp. 19-20), that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Corp.,* 309 U.S.

206, 226 (1940). However, the Supreme Court there also said that it was "the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes." 309 U.S. at 208. See *NLRB v. A. J. Tower Co.,* 329 U.S. 324, 330-331 (1946). The function of the Courts in reviewing the validity of representation elections was elaborated by the Seventh Circuit:

> "Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board." *Celanese Corp. of America v. NLRB,* 291 F.2d 224, 225 (7th Cir. 1961).

Respondent is not contesting the validity or applicability of the Board's ruling that observers must be chosen from among employees of the employer. On the contrary, Respondent contends that once a procedure has been adopted by the Board it cannot with impunity disregard what it has determined to be "an orderly, informed and specialized procedure." Certainly such a departure from its ordinary procedures is unwarranted where there are no unusual factors which would affect the applicability of its rules and where the contesting party, as here, made timely and sufficient demand for compliance with the procedure at the pre-election conference. Cf. *NLRB v. Huntsville Mfg. Co., supra,* 203 F.2d at 434. The Board can hardly contend that observers favorable to the union were not available from among the employees, in view of the election results in favor of the Union. Moreover, the primary purpose for providing election observers chosen by organizations appearing on the ballot is to identify and make certain that those voting are qualified to do so. See: *NLRB v. West Texas Utilities*

Co., 214 F.2d 732 (5th Cir. 1954); *Balfre Gear & Mfg. Co.,* 115 NLRB 19 (1956); NLRB "Instructions to Election Observers", Form NLRB-722, LRX 4309. A union official employed in another county is scarcely competent to exercise these functions.

The Board also argues that Respondent must have made some particular showing of special circumstances, such as improper electioneering by the Union observer, in order to find that his presence tainted the election process. But Respondent contends that the mere presence of such an observer compels the inference that a free election was thereby precluded. Election observers watch the employees as they come to vote, check off their names on the eligibility list, challenge them if they so desire, and watch the voters deposit their ballots in the ballot box. When the observer is an "outsider" unknown to the employees, and who obviously represents the Union, his mere presence must be deemed to arouse sufficient fears among the voters to void the election. The Regional Director's observation that Banner wore no Union insignia is of little, if any, weight in view of the Board's prior recognition that, even in the absence of labels, the affiliation of election observers is "generally well known to the employees." *Western Electric Co., Inc.,* 87 NLRB 183, 185 (1949). See *Firestone Tire & Rubber Co.,* 120 NLRB 1644 (1958). The Board itself has rejected the requirement that a specific showing of intimidation be made. In *International Stamping Co., Inc.,* 97 NLRB 921 (1951) it set aside an election and directed that a new election be held where the employer's observers were the son and sister-in-law of the employer's president. There, the Board declared:

> "In the interest of free elections, it has long been the Board's policy to prohibit persons closely identified with an Employer from acting as observers . . . *the fact that there is no showing of actual interference*

with the free choice of any voter or that no objection was raised at the time of the election *is of no moment.*

"As this Board said in a closely related situation, 'confidence in, and respect for established Board election procedures cannot be promoted by permitting the kind of conduct involved herein to stand.' [Peabody Engineering Co., 95 NLRB 952] Election rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned. We believe that the purposes of the Act would best be served by setting aside the instant election and directing a new one." [Emphasis supplied] 97 NLRB at 923.

The Board has repeatedly upheld the refusal of its Regional Directors to allow persons closely identified with the employer to act as its observer, and has set aside elections where such an observer has been used at the polls. See cases cited in Board brief, p. 19. And in *Southwestern Electric Service Co. v. NLRB,* 194 F.2d 939 (5th Cir. 1952), the court found that where a union official, not an employee of the company at which a certification election was being held, appeared and talked to voters in the polling area, the election would have to be set aside. Although the blatant electioneering on the part of the union official in that case may be absent in this, here the union official was not only present at the polling place, but was wearing an official observer's badge, thereby being clothed with a measure of respectability and implied Board approval not present in the *Southwestern Electric* case.

But the Board now seeks to explain the discrimination in its treatment of employer and union observers by stating that the courts have agreed that "generally union spokesmen may be distinguished from managerial officials, for the latter's immediate power to alter working condition[s] raises a risk of subtle pressures during the voting process"

(Board brief, p. 18). It is true that the Board itself has taken this position, but no court decisions favoring such a distinction have been cited. In fact, the Court in *Southwestern Electric Service Co. v. NLRB, supra,* 194 F.2d at 942, stated:

> "If the tables were turned, and a representative of the Company had done exactly what was done here, with a result favorable to the employer, the election should be set aside; and the *same rule* must apply in this case, where a free and fair election was interfered with by the activities of the union representative within the prohibited area." [Emphasis supplied]

The Board's view of the relative abilities of employers and unions to apply "subtle pressures during the voting process", and its application of stricter standards for the employer have been characterized as outdated and worthy of being discarded. Note, 38 Temple L.Q. 288, 298 (1965). And the fact that the election has been conducted at "considerable pains and expense" to the Board (R. 32) is also irrelevant. This is particularly true where, as here, the company made its objection known when first advised of the observer's identity, and in ample time to allow compliance with the Board's policy.

To here sanction the use of the non-employee Union observer and approve the certification of a bargaining representative based upon the election would run counter to the purposes and policies inherent in a democratic administrative process. The Field Manual provides that observers *must* be selected from among the non-supervisory employees of the employer, and this procedure has been consistently applied by the Board. See Kammholz and McGuiness, ALI Practice and Procedure before the NLRB, p. 35 (1962). The Board has repeatedly stated that elec-

tions are to be conducted under "laboratory" conditions. Observers closely identified with the employer have been precluded from serving as observers, and elections conducted in their presence have been set aside. Respondent made timely and repeated objections to the presence of this observer. No rational explanation was offered or is readily apparent to excuse the failure to select a non-supervisory employee as the Union's observer. In view of the foregoing, the Board's petition for enforcement should be denied.

C. The Board's Use of Summary Judgment Procedure in Rendering Its Order Was Improper.

As stated above, Respondent objected at the pre-election conference to the Regional Director's allowance of a non-employee to serve as the Union observer. After the election, a formal objection was lodged which was overruled by the Regional Director after an *ex parte* administrative investigation (R. 28, 30). The company's request for review of the decision was summarily denied by the Board, as was its request for reconsideration of the denial (R. 34, 41, 43, 46).

Respondent refused to bargain with the Union certified by the Board and consequently a complaint was issued charging Respondent with an unfair labor practice (R. 52). Respondent answered, generally denying the allegations of the complaint (R. 58). Thereupon, and before the scheduled hearing set for July 12, 1966, the General Counsel sought and obtained a "summary judgment" against Respondent (R. 83).

In support of its motion for summary judgment, General Counsel directed the Board's attention to the Supplemental Decision and Certification of Representative issued by the

Regional Director (R. 73; R. 30), wherein the Regional Director found that Wallace L. Banner, Jr., served as the Union's observer at the elections; that the Employer objected thereto; and that the Board agent permitted Banner to serve in spite of the objection. The Regional Director also found that Banner was an elected vice-president and member of the Union's executive board, and that he was employed as an automobile salesman in San Francisco, outside the geographical limits of PADA (R. 31; Tr. 57-58). The Regional Director determined, on the basis of his findings that Banner wore no Union insignia and that he spoke to none of the voters in the course of the election, that "the Employer's objection therefore is found to be without merit." (R. 31-32).

1. NEITHER THE ADMINISTRATIVE PROCEDURE ACT, THE NATIONAL LABOR RELATIONS ACT, NOR THE BOARD'S OWN RULES AND REGULATIONS AUTHORIZE THE BOARD'S USE OF A SUMMARY JUDGMENT PROCEDURE IN AN UNFAIR LABOR PRACTICE PROCEEDING.

The Administrative Procedure Act, National Labor Relations Act, and the Board's own Rules and Regulations and Statement of Procedure make no mention of, or provision for, the disposition of matters by the use of summary judgment proceedings. In fact, the use of this extraordinary procedure is impliedly prohibited.

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, sets forth general requirements for adjudicatory proceedings required to be determined on the record after an opportunity for agency hearing. And § 7(c) provides that where hearings are required thereunder by § 5:

> "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d).

Section 10(b) of the National Labor Relations Act requires that an unfair labor practice complaint contain a "notice of hearing before the Board . . . or before a designated agent or agency," and the person against whom the complaint is issued is given the right "to appear in person or otherwise and give testimony." 29 U.S.C. § 160(b). See: *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264 (1940); *Marine Engineers' Beneficial Assn. v. NLRB,* 202 F.2d 546, 548-549 (3rd Cir. 1953).

Respondent's contention is further supported by the fact that in adjudicatory agency proceedings, questions of policy are often presented upon which the Board does and should receive arguments and statements of counsel. See 1 Davis, Administrative Law §§ 7.02, 7.07 (1958). In recognition of this fact, the Administrative Procedure Act provides that:

> "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, *arguments,* offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit. . . ." [Emphasis supplied] 5 U.S.C. § 554(c).

The Board relies upon its rules providing generally for pre-hearing motions in order to support its use of motions for summary judgment. NLRB Rules & Regs., § 102.24, 29 C.F.R. § 102.24. However, a perusal of §§ 102.28 and 102.92 of the Rules and Regulations clearly demonstrates that the motions allowed in § 102.24 refer only to procedural matters not affecting the ultimate disposition on the merits. 29 C.F.R. §§ 102.28, 102.92. Moreover, § 102.27 specifically provides for a motion to dismiss the entire complaint, and § 102.26 provides that unless otherwise expressly authorized, rulings on motions by the Regional Director or Trial Examiner "shall not be appealed directly to the Board

except by special permission of the Board, but shall be considered by the Board in reviewing the record . . .," thereby indicating the exclusion of the extraordinary motion for a summary judgment under § 102.24. 29 C.F.R. §§ 102.24, 102.26, 102.27.

Even if allowed by the Administrative Procedure Act and the National Labor Relations Act, Respondent contends that, at least in the absence of a Board rule duly adopted pursuant to 5 U.S.C. § 553, the Board may not use the extraordinary procedure of summary judgment.

2. EVEN IF THE BOARD MAY RENDER SUMMARY JUDGMENT ON AN UNFAIR LABOR PRACTICE COMPLAINT, IT WAS ERROR TO DO SO WHERE SUBSTANTIAL AND MATERIAL ISSUES OF FACT WERE PRESENTED TO THE BOARD.

If this Court should find that the Board may properly utilize summary procedure, in spite of the absence of statutory authority and the lack of opportunity on the part of Respondent for cross-examination and presentation of oral argument, it is still clear that such a procedure conforms to the requirements of due process only where no disputed issues of material fact are presented. See, e.g.: *Macomb Pottery Co. v. NLRB,* 376 F.2d 450, 452 (7th Cir. 1967).

Respondent, admittedly, could have proferred no evidence in the unfair labor practice proceeding on the question of the proper unit determination which was not available to it at the pre-election hearing. However, Respondent submits that there were genuine and material issues of fact presented as to the validity of the election and subsequent certification of the Union representative based upon Respondent's objections to the use of the non-employee Union observer at the polls. As to this issue, the Board's order was rendered solely upon the basis of the Regional Director's supplemental decision and certification. This

decision was rendered upon the Regional Director's *ex parte* administrative investigation under § 102.69 of the Rules and Regulations, 29 C.F.R. § 102.69, which was conducted without opportunity for Respondent to be heard, to present evidence, or to cross-examine persons giving testimony to the Regional Director.

This Court has repeatedly warned of the dangers of entering summary judgment in civil actions under Fed. R. Civ. P. 56, referring to it as a "drastic remedy", *Consolidated Electric Co. v. United States,* 355 F.2d 437, 438 (9th Cir. 1966), to be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). And:

> "An issue of fact may arise from inferences to be drawn from the evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *United States ex rel. Austin v. Western Electric Co.,* 377 F.2d 568, 572 n. 11 (9th Cir. 1964). See also: *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535, 539 (9th Cir. 1959); *Hoffman v. Babbit Brothers Trading Co.,* 203 F.2d 636, 638 n. 1 (9th Cir. 1953); Wright, Federal Courts § 99 (1963).

At the very least, the presence of a non-employee Union observer at the election polls gives rise to the inference that the election was not conducted under the "laboratory" conditions so frequently espoused by the Board.

Remarkably similar issues were presented to the Third Circuit in the case of *NLRB v. Capital Bakers, Inc.,* 351 F.2d 45, 50-52 (3d Cir. 1965). There, the question involved respondent company's objection to the union's election challenge of an employee. After noting the provisions of

the Board's Rules and Regulations, § 102.69(c), providing that the Regional Director may conduct a hearing where substantial and material factual issues are presented, the Court found that the Regional Director's report itself established the existence of such "substantial and material factual issues." 29 C.F.R. § 102.69(c). And the Court declared that "all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence." 351 F.2d at 50. Then, after citing the provisions for a hearing contained in § 10(b) of the Act and § 102.69(e) of the Rules and Regulations, the Court stated:

> "It is apparent that the status of the employee whose ballot was challenged presents a substantial factual issue. The extent of the Regional Director's discussion of facts attests to its substance . . . Therefore, the failure to determine this issue on the basis of a hearing constitutes a clear abuse of discretion on the part of the Regional Director, which has been allowed to stand at the successive stages of the proceedings on the grounds that the original determination was not open to subsequent review. Not only the Rules and Regulations, but due process of law demands that a hearing be held on this contested factual issue at some stage of the administrative proceeding before respondent's rights can be affected by an enforcement Order." *NLRB v. Capital Bakers, Inc., supra,* 351 F.2d at 51. Accord: *NLRB v. Bata Shoe Co.,* 377 F.2d 821, 825-826 (4th Cir. 1967); *NLRB v. Lamar Elec. Membership Corp.,* 362 F.2d 505 (5th Cir. 1966); *International Ladies Garment Workers Union v. NLRB,* 339 F.2d 116, 124-125 (2nd Cir. 1964); *NLRB v. Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *NLRB v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712, 715-716 (10th Cir. 1964); *NLRB v. Joclin Mfg. Co.,* 314 F.2d 627, 630-633 (2nd

Cir. 1963); *NLRB v. Lord Baltimore Press, Inc.,* 300 F.2d 671 (4th Cir. 1962); *NLRB v. Poinsett Lumber & Mfg. Co.,* 221 F.2d 121 (4th Cir. 1955); *NLRB Rules and Regulations* § 102.69, 29 C.F.R. § 102.69. Cf. *NLRB v. Sun Drug Co.,* 359 F.2d 408 (4th Cir. 1966).

§ 102.69(c) of the NLRB Rules and Regulations provides, in part, that the Regional Director's decision on objections to election "may be . . ., if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer. . . ." 29 C.F.R. § 102.69(c). But:

> "The Board properly has not contended either that the Regulations' use of the phrase 'appears to the Board' makes its determination conclusive . . ., or that their use of the verb 'may' gives it an unfettered discretion to grant or deny a hearing. . . ." *NLRB v. Joclin Mfg. Co., supra,* 314 F.2d at 621.

Here, the Regional Director's investigation "itself reveals . . . that material factual issues exist which can be resolved only by a hearing," *U.S. Rubber Co. v. NLRB,* 373 F.2d 602, 606 (5th Cir. 1967), in that the observer was one of the Union's officers who was not an employee of respondent company. If the use of such an observer is not sufficient in and of itself to void the election, and even if, as contended by the Board, special circumstances such as improper electioneering are necessary to set aside the election, the presence of such an observer must be held to establish a *prima facie* showing of such "special circumstances" sufficient to require a hearing. See: *NLRB v. Bata Shoe Co., supra,* 377 F.2d at 826; *NLRB v. Lamar Elec. Membership Corp., supra,* 362 F.2d at 508; *Jat Transportation Corp., supra,* 131 NLRB 122.

At the very least, then, Respondent must be given the opportunity to confront and cross-examine witnesses and inspect evidence relied upon by the Regional Director in making his *ex parte* investigation and report, which in turn was relied upon by the Board in entering its summary judgment. *NLRB v. Indiana and Michigan Elec. Co.,* 318 U.S. 9, 28 (1943); *NLRB v. Poinsett Lumber & Mfg. Co., supra,* 221 F.2d at 123.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Board's petition for enforcement of its order should be denied or, in the alternative, that this matter should be remanded to the Board for further proceedings in light of *NLRB v. Metropolitan Life Ins. Co., supra,* 380 U.S. 438, and for hearing on Respondent's objections to the election in accordance with NLRB Rules and Regulations § 102.69 (c), 29 C.F.R. § 102.69(c).

Dated: December 28, 1967

Respectfully submitted,

SEVERSON, WERSON, BERKE & BULL
NATHAN R. BERKE
By NATHAN R. BERKE

Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE
Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILLIAM WARD EHLERT, Appellant, v. NITED STATES OF AMERICA, Appellee.	No. 21930

BRIEF FOR THE APPELLEE

CECIL F. POOLE
United States Attorney

PAUL G. SLOAN
Assistant United States Attorney

Attorneys for Appellee,
United States of America

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IN THE UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

WILLIAM WARD EHLERT, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 21930

BRIEF OF THE APPELLEE

JURISDICTION

This is a timely appeal, [1] by appellant with retained counsel, from a judgment of conviction and sentence for violation of the Universal Military Training and Service Act [Title 50 Appendix U.S.C., § 462(a)]. Jurisdiction in the District Court was predicated on Title 50 Appendix U.S.C., § 462(a) and Title 18 U.S.C., § 3231; jurisdiction on appeal

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1/ A judgment of conviction and commitment was entered against the appellant, represented at all stages of the proceedings by retained counsel Arthur Wells, Jr., on May 31, 1967 (Record (hereinafter referred to as R.), Vol. 1, p.8). A notice of appeal was filed on June 5, 1967 (R., Vol. 1, p.9; Fed. R. Crim. P. 37(a)(2).)

is invoked under Title 28 U.S.C., § 1291 and § 1294.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

The Federal Grand Jury at San Francisco, California, returned an indictment on December 14, 1966, in one count charging appellant with a violation of Title 50 Appendix U.S.C. § 462(a), (R., Vol. 1, p.2). Specifically, the indictment charged that "WILLIAM WARD EHLERT, defendant herein, on or about February 9, 1966, * * * did willfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules, regulations, and directions duly made pursuant thereto, in that he, having reported for induction as ordered by his local board, did then and there refuse to submit to induction into the Armed Forces of the United States."

The appellant pleaded not guilty, and, following the execution of a jury waiver, the case was tried and concluded on March 29, 1967, before the Hon. Alfonso J. Zirpoli (R., Vol. 1, pp.3,11). Appellant was found guilty, and on May 31, 1967, was sentenced to the custody of the Attorney General for a period of two years (R., Vol. 1, p.8). This appeal followed. Appellant is presently at large on bail in the

amount of $500.00, and execution of sentence has been stayed pending appeal.

B. STATEMENT OF FACTS:

Appellant registered with the Selective Service System at Local Board No. 18, Santa Rosa, California, on July 24, 1961, two days after his eighteenth birthday (Exhibit, 2/ p.2). In his original Classification Questionnaire, filed with the local board on January 20, 1964, he made no claim of conscientious objection (Exhibit, pp.4,7), and on March 3, 1964, he was accordingly classified I-A (Exhibit, p.11). Subsequently, after having been physically examined and found fully qualified for military service, he was ordered to report for induction on July 14, 1965 (Exhibit, p.17). On that date, he reported to the bus depot to which he had been directed, but refused to board the bus, stating that he would not go to the Induction Station (Exhibit, p.22). He was directed to report to the local board which he did, and there requested SSS Form No. 150, Special Form for Conscientious Objector (Exhibit, p.22).

Without signing either statement A or statement B on the face of SSS Form 150 as required in the instructions printed thereon, appellant submitted the form to his local board on July 26, 1965, together with a brief letter (Exhibit, pp.24, 25-28).

2/ A certified and exemplified copy of Appellant's Selective Service file was introduced into evidence as Plaintiff's Exhibit 1 (R., Vol. 1, p.9). That Exhibit was designated as part of the record on appeal (R., Vol 5, p.14), and is before this Court as such, and is hereinafter referred to as Exhibit.

On January 18, 1966, appellant's Selective Service file having in the meantime been forwarded to the United States Attorney for prosecutive determination and having been returned to the local board for further review (Exhibit, pp.29-35), the local board considered appellant's claim and declined to re-open his classification or to re-classify him on the ground that he had not demonstrated a change in his status which was beyond his control (Exhibit, pp.11,39). Appellant was so advised (Exhibit, p.36), and was thereafter ordered to report for induction on February 9, 1966, pursuant to the original induction order (Exhibit, p.38). He reported as ordered but refused to complete the processing necessary to determine his acceptability for military service (Exhibit, p.42). These proceedings ensued.

STATUTE AND REGULATION INVOLVED

Title 50 Appendix U.S.C. § 462(a) provides in pertinent part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of * * * [the Universal Military Training and Service Act] or rules, regulations, or directions made pursuant to * * * [the Universal Military Training and Service Act] shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 C.F.R. § 1632.14 provides in pertinent part as follows:

> Duty of Registrant to Report for and Submit

> to Induction. --(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252) * * * it shall be the duty of the registrant to report for induction at the time and placed fixed on such order. * * *
>
> (b) Upon reporting for induction, it shall be the duty of the registrant * * * (5) to submit to induction * * *

32 C.F.R. § 1625.2 provides in pertinent part as follows:

> The local board may reopen and consider anew the classification of a registrant * * * provided, * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from the circumstances over which the registrant has no control.

QUESTIONS PRESENTED

Whether a change in status to that of conscientious objector is a change within the meaning of 32 C.F.R. Section 1625.2, and whether in any event the record reflects a basis in fact for the refusal of appellant's local board to re-open his classification following his submission after his induction order had issued of a claim for conscientious objector status.

SUMMARY OF ARGUMENT

A change in status to that of conscientious objector is not, as a matter of law, a change in status beyond a registrant's control within the meaning of 32 C.F.R. Section 1625.2.

Alternatively, without reference to the question of whether a change in status to that of conscientious objector is a change within the above-cited regulation, there exists a basis in the record before this Court for upholding the local board's determination and thus appellant's conviction.

ARGUMENT

I. A CHANGE IN STATUS TO THAT OF CONSCIENTIOUS OBJECTOR IS NOT, AS A MATTER OF LAW, A CHANGE IN STATUS BEYOND A REGISTRANT'S CONTROL WITHIN THE MEANING OF 32 C.F.R. § 1625.2.

It is the Government's position that a change in status to that of conscientious objector is not, as a matter of law, a change in status beyond a registrant's control within the meaning of 32 C.F.R. § 1625.2. 3/ The court below so ruled, at least by implication, and that ruling is assigned as error.

It should be noted at the outset that the trial court's ruling in this case is susceptible of more than one interpretation. Judge Zirpoli stated, without elaboration:

> If this were a case in Judge Kaufman's Circuit I would feel, based on the record before me, I would have to, I would have to acquit the accused. (R., Vol. III, p. 31)

His reference is to Judge Kaufman's decision in United States

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3/ If this position is upheld, it would follow, of course, that appellant was not denied due process by the failure of his local board to re-open his classification following his submission of SSS Form No. 150, regardless of the nature of his beliefs or the point in time at which they crystalized.

v. Gearey, 368 F.2d 144 (2d Cir., 1966), [4] and his determination that, consistent with that decision, an acquittal would be required indicates at least that he believed appellant's views with respect to conscientious objection matured after his induction notice was mailed. To be completely consistent with Gearey, however, in order to suggest an acquittal he would also have had to have concluded that appellant was in fact entitled to conscientious objector status, and it is submitted that there is nothing in the record before this Court to suggest that the trial court was so persuaded. Nevertheless, the court did make the statement quoted above, and it follows that the court's ultimate determination of guilt necessarily involved the proposition urged by the Government here.

Three other Circuits have taken the position argued for by the Government. In Davis v. United States, 374 F.2d 1 (5th Cir, 1967), United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir., 1966), and United States v. Schoebel, 201 F.2d 31 (7th Cir., 1953), [5] with respect to factual

[4] In Gearey, Judge Kaufman took the position that if a registrant's beliefs with respect to conscientious objection brought him within the ambit of the exemption and those beliefs ripened only after he had been mailed a notice to report for induction, a change in his status resulting from circumstances over which he had no control would have come about, and he would accordingly be entitled to a re-opening and re-classification by his local board. It would follow, of course, that any failure to accord such procedure to a registrant so situated would constitute a denial of due process.

[5] The Seventh Circuit recently re-affirmed its position in Schoebel in United States v. Porter, 314 F.2d 833 (7th Cir., 1963).

situations essentially indistinguishable from that presented here, the courts held without qualification that "[b]elated development of conscientious objection is not a change in status beyond the control of [a] registrant." Davis v. United States, supra, at p.4.

This Court indicated its apparent approval of that position in Boyd v. United States, 269 F.2d 607 (9th Cir., 1959), 6/ and in Parrott v. United States, 370 F.2d 388 (9th Cir., 1966), ostensibly rejected Judge Kaufman's position in Gearey.

Certainly such a position is not unreasonable, even though it may arguably be said to be in conflict with the apparent desire of Congress to protect those conscientiously opposed to participation in war in any form from the induction process. Clearly the exemption for conscientious objectors, found in Section 456(j) of the Universal Military Training and Service Act, is provided as a matter of legislative grace, and it is not unreasonable, therefore, in determining it's availability to defer in some measure to the obvious need for an efficient operation of the Selective Service System. To

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6/ In Boyd, this Court stated at p. 610:

> There is not raised herein the proposition that conscientious objections resulting from the promptings of a registrant's conscience would be a change of status over which the registrant has no control. But we think that such an interpretation would, as other courts have said, be a 'strained interpretation of the regulation.' Such interpretation would make redundant and useless any finding by the Board subsequent to the filing of the conscientious objector's claim.

require a local board to make the almost impossible factual determination with respect to when a registrant's views might have "crystalized" in each case where the claim is filed after an induction order was mailed, and to then permit a registrant who's classification was not re-opened to litigate the basis for the board's determination, would clearly impair the efficiency of the System to an extent not required, it is submitted, by the enactment of Section 456(j). It may be that to essentially cut off the availability of the exemption with the mailing of an Induction Notice would be to draw too arbitrary a line, but as this Court stated in Boyd:

> There must be some end to the time when registrants can raise a claim of conscientious objection to induction, and raise and re-raise an alleged right to review. Any other conclusion would result in chaos. Boyd v. United States, supra, at p. 612.

II. IN THE RECORD BEFORE THIS COURT, APPELLANT HAS NOT MADE OUT A PRIMA FACIE CLAIM FOR CONSCIENTIOUS OBJECTOR STATUS, AND THUS THIS COURT CAN FIND A BASIS IN FACT FOR THE ACTION OF THE LOCAL BOARD WITHOUT REFERENCE TO ANY FINDING MADE BY THE TRIAL COURT.

As an alternative to the position urged in the previous section, the Government submits that a basis exists in the record before this Court for affirming appellant's conviction without reference to the question of whether under some circumstances a change in status to that of conscientious objector is a change within the ambit of 32 C.F.R. § 1625.2.

As previously indicated, aside from his remark regarding an acquittal, there is nothing in the record to suggest that Judge Zirpoli was persuaded that appellant was entitled to conscientious objector status, and it is the Government's position, therefore, that this Court can rule, based upon a review of the record, that as a matter of law he was not. Clearly his Form 150 and the letters which accompanied it do not, even under the most generous interpretation of United States v. Seeger, 380 U.S. 163 (1965), present a prima facie claim, 7/ and under these circumstances, this Court can conclude that the local board did not deny appellant due process in refusing to re-open his classification. As recognized in Gearey, there can be no change in status if appellant is not now and never has been entitled to the exemption, and thus there is presented a basis in fact for the board's action which in turn provides a basis for upholding appellant's conviction. 8/

7/ Without regard to the sincerity of appellant's beliefs, or the fact that he failed to sign either statement A or B on the face of the Form 150, it is apparent that he is espousing a purely moral position, which is specifically excluded from the ambit of the exemption.

8/ The only claim of denial of due process raised by appellant by way of defense related to the board's refusal to re-open following the submission of his Form 150.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the conviction of the appellant should be affirmed.

DATED: November 20, 1967.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

PAUL G. SLOAN
Assistant United States Attorn

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL G. SLOAN
Assistant United States Attorney

No. 21930

EHLERT v. UNITED STATES

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Brief of the Appellee was mailed this date to Arthur Wells, Jr., Esq., Wells & Chesney, 2550 Telegraph Avenue, Berkeley, California, Attorney for Appellant.

DATED: November 20, 1967.

PAUL G. SLOAN
Assistant United States Attorney

No. 21930

EHLERT v. UNITED STATES

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CHECKER VAN & STORAGE OF OAKLAND, INC., Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 21961 APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE ALBERT C. WOLLENBERG
UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS

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I N D E X

TABLE OF AUTHORITIES

C A S E S

S T A T U T E S

I. STATEMENT OF PLEADINGS

The complaint, filed on 4 October 1966 (T1),[1] alleges that:

A. Appellant is a public warehouseman and entered into a contract with the United States for storage of goods of military personnel (T2). Copies of the contract and of the warehouse receipt issued for said goods are attached to the complaint as Exhibits A and B (T4-26).

B. About 2 March 1964 a fire occurred in the warehouse leased by appellant where the goods were stored; the goods were damaged and the contracting officer determined that appellant was liable in the sum in excess of $10,000 for the damage to the goods. Appellant appealed to the Armed Services Board of Contract Appeals (T2).

C. The Armed Services Board of Contract Appeals issued two decisions affirming the action of the contracting officer. The decisions are attached to the complaint as Exhibits C and D (T27-40).

D. The United States has threatened to register appellant's name on the List of Contractors Indebted to the

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[1] The transcript on appeal will be referred to as T.

United States and has threatened to cancel all of appellant's contracts with the United States if payment is not made by appellant for the loss of said goods (T2-3).

E. The decision of the Armed Services Board of Contract Appeals is contrary to law and is not supported by substantial evidence (T3).

F. The action was brought pursuant to Federal Rules of Civil Procedure Rule 57; 28 USC §1331; 41 USC §321 and §322 and 5 USC §1009 (T1). The jurisdiction of the District Court also was claimed on the basis of 28 USC §1346(a)(2) (T46-47; 51).

The United States filed a motion to dismiss (T41-45); appellant filed a memorandum in opposition to the motion to dismiss (T46-52).

On 16 March 1967 the court filed its order granting the motion to dismiss (T54-55); judgment of dismissal was entered on 16 March 1967 (T57).

A notice of appeal was timely filed on 12 May 1967 (T58).

This court has jurisdiction to review the dismissal of this action pursuant to 28 USC §1291.

II. STATEMENT OF THE CASE

The sole question in this appeal is whether the United States District Court has jurisdiction over the complaint filed herein. Appellant contends that the basic jurisdiction of the

District Court rests upon 28 USC §1346(a)(2) and 41 USC §§321 and 322, and that therefore pursuant to Federal Rules of Civil Procedure Rule 57 and 28 USC §2201-2 and 5 USC §1009 the District Court has jurisdiction to entertain this declaratory relief action.

III. SPECIFICATION OF ERROR

The error claimed to have occurred in this case is the dismissal of the action by the District Court.

IV. ARGUMENT

A. Summary

The Court of Claims has no jurisdiction of the case since its jurisdiction is restricted by 28 USC §1491 to claims against the United States; appellant herein is resisting a claim of the United States. Congress has expressed its intent pursuant to 41 USC §§321 and 322 to allow judicial review from a determination of the Armed Services Board of Contract Appeals and the only review available is in the United States District Court. The District Court's jurisdiction pursuant to 28 USC §1346(a)(2) is not limited to claims, but extends to "actions" as well. In light of the above, the $10,000 limitation of 28 USC §1346(a)(2) must be disregarded so as to provide appellant with the congressionally intended judicial review of the decision of the Armed Services Board of Contract Appeals.

B. There is no jurisdiction in the Court of Claims.

28 USC §1491 limits the jurisdiction of the Court of Claims to "claims" against the United States; as shown by the complaint (T1) appellant has no claim against the United States but is resisting a claim of the United States against appellant. Therefore, the Court of Claims has no jurisdiction over this case.

C. The United States District Court has jurisdiction.

28 USC §1346(a)(2) upon which appellant bases the jurisdiction of the District Court, refers to "civil action" or claims against the United States, clearly indicating that the jurisdiction of the District Court is not limited to a money claim against the United States.

Wells v United States (9th Cir 1960) 280 Fed2d 275 [cited by appellee below (T44)] is not to the contrary. Pursuant to statutory authority, the AEC sold land to a former lessee. A dispute arose concerning a deduction from the purchase price of the value of certain improvements made by the lessee. The dispute was referred to an AEC administrative hearing. A decision unfavorable to the lessee was rendered and he filed suit in the District Court for declaratory judgment. The case was dismissed and affirmed on appeal.

The case is distinguishable because the AEC statute

expressly precluded judicial review of the determination of the AEC hearing officer. To the contrary in the case at bar, 41 USC §321 and §322 expressly call for judicial review of the determination of the Armed Services Board of Contract Appeals.

In Blanc v United States (2nd Cir 1957) 244 Fed2d 708 (cited in Wells), a widow sued the United States for widow's benefits under the Federal Employees Compensation Act (5 USC §751). An administrative hearing was held and the ruling was unfavorable to the widow. She then filed a declaratory judgment suit in the United States District Court; the action was dismissed and affirmed on appeal.

The Court held that since the claim exceeded $10,000, only the Court of Claims had jurisdiction. On this basis alone the case is distinguishable from the case at bar where the Court of Claims does not have jurisdiction because of the lack of a money claim by appellant.

The Court also noted that 5 USC §793 expressly prohibits judicial review of the administrative determination; the section states that the administrative determination shall be "final and conclusive for all purposes and with respect to all questions of law and fact and not subject to review by any court". To the contrary, in the case at bar, 41 USC §321 and §322 show that the determination of the Armed Services Board of Contract Appeals

is not to be final and conclusive but is to be judicially reviewable.

In Clay v United States (DC Cir 1953) 210 Fed2d 686 (cited in Wells) the plaintiff filed a declaratory relief action in the District Court against the United States to void an assignment of a patent. The action was dismissed and affirmed on appeal.

The court held that 28 USC §1346(a)(2) does not lie for an equity suit, but only for a money claim. The case is distinguishable, however, in that the court did not deal with the issue of whether the District Court had residual jurisdiction if the Court of Claims did not have jurisdiction. That is the issue before this Court in the case at bar.

Appellee below (T43) cited three cases for the proposition that the District Court lacked jurisdiction because appellant's controversy with United States exceeds $10,000. The cited cases, Barnes v United States (9th Cir 1956) 241 Fed2d 252; United States v Tacoma Oriental SS Co (9th Cir) 86 Fed2d 63 and Ove Gustavsson Contracting Co v Floete (2nd Cir 1960) 278 Fed2d 912, cert den 264 US 894, all were cases involving a money claim in excess of $10,000 by a plaintiff against the United States; in each case it was clear that the Court of Claims had jurisdiction and that there was no need for jurisdiction to be found in the District Cour

The case at bar does not involve a money claim and therefore the case is not within the jurisdiction of the Court of Claims. In such a situation, the fact that the controversy is in excess of $10,000 should not preclude appellant from any judicial relief but should place jurisdiction in the courts of residual jurisdiction, namely, the United States District Courts.

D. Congress intended for the United States District Courts to have jurisdiction to review decisions of the Armed Services Board of Contract Appeals.

Chapter 5 of 41 USC deals with "judicial review of administrative decisions" and §321 provides that:

> "no provision of any contract entered into by the United States...shall be pleaded in any suit...as limiting judicial review: provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply a bad faith or is not supported by substantial evidence."

It is obvious that this section is intended to provide judicial review where a party (as appellant) claims that the decision of the administrative body is not supported by substantial evidence.

Furthermore, 41 USC §322 states: "no government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board".

This section shows the intent of Congress to provide judicial review of questions of law involved in a determination of an administrative body. The "dispute clause" of the contract involved in this case (T10) incorporates that law and provides that "nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law".

The significance of 41 USC §322 and the dispute clause is shown by a comparison to Wells and Blanc, supra. The statues in both cases expressly preclude judicial review of the administrative decision.

However, it is clear from 41 USC §322 that Congress intended that judicial review be available from a decision of the Armed Services Board of Contract Appeals.

Since the judicial review from that determination is not available in the Court of Claims, it is obvious that the intent of Congress would be frustrated unless judicial review was available in the United States District Courts.

E. Conclusion.

Upon an analysis of 28 USC §1346(a)(2) and 41 USC §321 and §322, it is clear that Congress has expressed an intent that judicial review shall be available from a decision of the Armed Services Board of Contract Appeals.

Since the Court of Claims has jurisdiction solely over claims for money and since the District Court's jurisdiction is not limited to claims for money, it is clear from logic and from the above statutes that the District Court has jurisdiction over this case even though it involves in excess of $10,000.

To hold otherwise is to deprive appellant of any judicial recourse even though the United States has threatened to place appellant's name on the List of Contractors Indebted to the United States and has threatened to cancel all of appellant's contracts with the United States if payment is not made by appellant for the loss of the goods. Under these circumstances, due process of law requires that appellant be given judicial review immediately by the United States District Court.

For the above reasons, the judgment of dismissal should be reversed.

DATED: San Francisco, California
16 October 1967

Respectfully submitted,

LONG & LEVIT
JOHN B. HOOK
GERALD Z. MARER

BY: Gerald Z. Marer
Gerald Z. Marer
Attorneys for appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeal for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED: 16 October 1967
San Francisco, California

Gerald Z. Marer
Attorney for Appellant

I am a citizen of the United States and a resident of the county of San Francisco, I am over the age of eighteen years and not a party to the within above entitled action; my business residence address is:

465 California Street, San Francisco, California

On 17 October, 19 67, I served the within

APPELLANT'S OPENING BRIEF

on the appellee in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at addressed as follows:

to: Messrs. Alan S. Rosenthal and Robert C. McDiarmid
Attorneys
Appellate Section
Civil Division, Room 3706
United States Department of Justice
Washington 25, D. C.

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on 17 October 1967 (date) at San Francisco (place), California

Signature

*proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

ATTORNEYS PRINTING SUPPLY FORM NO. 11

Nos. 22,013 - 22,018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON W. SCALES and KATHLEEN A. SCALES,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

MONA J. MASON (FORMERLY MONA J. PARKER),
Plaintiff

v.

ROBERT A. RIDDELL,
Defendant-Appellant

JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

FRED J. HOWARTH and PAULINE J. HOWARTH,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

ON APPEALS FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

Of Counsel:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,013
LEON W. SCALES and KATHLEEN A. SCALES, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,014
ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,015
A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,016
MONA J. MASON (formerly MONA J. PARKER), Plaintiff v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,017
JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW, Plaintiff v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,018
FRED J. HOWARTH and PAULINE J. HOWARTH, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

ON APPEALS FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

1. In their "Brief for Appellees" the taxpayers first argue (Br. 6-14) that this Court need not even consider the substantive issues involved herein but rather should dismiss the Government's appeal on the ground that it is taken from a stipulated or consent judgment of the District Court.

This Court, pursuant to taxpayers earlier motion to dismiss which asserted "that a consent or stipulated judgment would not be appealable", has already ruled on this issue and by its order upheld the Government's appeal. That order was made the subject of a petition for certiorari by taxpayers which was denied by the Supreme Court. In our memorandum

in opposition to that petition we stated:

> The issue here is not, as the petitioners state (Pet. 2), whether a consent or stipulated judgment is appealable, but whether the district court's judgment is a consent judgment. In the orders of February 17 and May 31, 1966, the district court, on the basis of a contested motion for summary judgment, disposed of the question whether money and land petitioners received as holders of certain deeds of trust were taxable as ordinary income or as capital gain. That decision left open a third issue concerning the fair market value of the land. This third issue was the only matter stipulated or agreed to through the so-called "Stipulated Judgment" of March 16, 1967. The limited effect of the "Stipulated Judgment" is made plain by its recitation that it was to be "coupled with the judgment entered on February 17, 1966 * * *". Just as plainly, respondent remained free to dispute on appeal the matters decided in 1966 on the basis of an adversarial contest.

From the foregoing, it is clear that taxpayers have had their day in court on this issue and are not entitled to any further consideration by this Court.

2. In our opening brief, the Government advanced the position, consistent with that taken in the court below, that the gain realized by the taxpayers from Trusts 473 and 482 in the Kearney Park note and land transaction was properly taxable as ordinary income in its entirety rather than as capital gains as held by the lower court. In advancing our basic contention, the Government divided the subject transaction into two categories, the proceeds from payment of the two Kearney Park notes and the proceeds from the disposition of the taxpayer's interests in the Kearney Park land securing the two notes. This approach is clearly consistent with that taken by this Court in Margolis v. Commissioner, 337 F. 2d 1001, 1009 (C.A. 9th, 1964).

With respect to the first category of gain, it is the Government's consistent position that the proceeds which are strictly attributable to payment of the notes represent the receipt of ordinary income since there is lacking the statutory requisite of a sale or exchange of a capital asset which would be necessary for capital gain treatment. See pages 19 and 20 of our original brief; Section 1222(3), Internal Revenue Code of 1951; Fairbanks v. United States, 306 U.S. 436.

In parts II and V of their brief (Br. 14-15, 28), taxpayers attempt to rebut the Government's contention with respect to gain from payment of the notes. They argue that the gain on the notes is not discount income and that the notes represent capital assets. However, the taxpayers conspicuously fail to make any attack upon the Government's main contention that the critical element of a sale or exchange is lacking. Taxpayers' failure to dispute this point is tantamount to an admission that the Government's position is correct and the judgment of the lower court should be reversed in this respect.

Also in part V of their brief (Br. 28) the taxpayers assert that this Court's decision in the Margolis case which allowed capital gains treatment with respect to the gain derived by Margolis from his sale of his beneficial interest in Trusts 473 and 482, which of course included the notes, settled the instant issue with respect to the taxability of the gain derived by the instant taxpayers from the payment of such notes out of the proceeds of the Navy purchase. But Margolis' situation in this respect is clearly distinguishable from

that of the taxpayers here in that the latter retained their beneficial interests in the two promissory notes until they were paid off from the proceeds of the Navy purchase. Thus, in their particular case the proceeds which represented payment of the face value of the two notes represented the extinguishment of the debtor's obligation, rather than the sale or exchange of an asset. Moreover, it is obvious, the taxpayers to the contrary notwithstanding (Br. 5), that it is immaterial that the payment for the land went from the Navy to the trustee of Trusts 473 and 482 rather than directly to the taxpayers. It had been agreed by the parties that the proceeds would be used to payoff the notes and in this situation the trustee was a mere conduit.

The second aspect of the case concerns the proper tax treatment of the gain realized on the sale of the Kearney Park land and that portion thereof transferred to the taxpayers in kind. Our position, consistent with this Court's statement in Margolis v. Commissioner, supra, p. 1009, is that taxpayers organized a joint venture with Margolis (who, unquestionably, as this Court held (p. 1009) was in the business of disposing of real estate) for the purpose of acquiring both the Kearney Park notes and an interest in the land securing the notes and accordingly held the subject property for sale to customers in the ordinary course of the business of the joint venture. Therefore, the interest in the real estate so disposed of is not a capital asset within the meaning of Section 1221 of the Code and does not qualify for capital gains treatment.

At the outset, taxpayers argue (Br. 16) that the transaction involving the disposition of the Kearney Park land to the Navy was an involuntary conversion rather than a sale. This contention is contrary to the findings of the lower court, which implicitly treated the transaction as a mere arm's-length transaction between buyer and seller. The record in this case discloses nothing more than the acquisition of the notes and interest in the Kearney Park land by taxpayers with a view towards sale to the Department of the Navy when funds for such purpose were made available by Congress, and that taxpayers voluntarily negotiated that sale as they would have done with any other class of purchaser. The taxpayers, seeking to uphold the judgment of the lower court, nonetheless desire to have this Court characterize the record evidence contrary to the District Court's characterization. But it is apparent there would be no basis for such action.

While not disputing the principle that ordinary income treatment may ensue where two or more individuals combine in a joint enterprise for their mutual benefit and the venture acquires property and holds it for sale to customers in the ordinary course of the business of that venture (Luckey v. Commissioner, 334 F. 2d 719 (C.A. 9th); Bauschard v. Commissioner, 279 F. 2d 115 (C.A. 6th); Zack v. Commissioner, 25 T.C. 676, affirmed per curiam, 245 F. 2d 235 (C.A. 6th); Brady v. Commissioner, 25 T.C. 682), the taxpayers seemingly argue (Br. 18) that that principle has no relevance in this case even if the instant taxpayers and Margolis organized a joint venture. This

argument apparently is to the effect (Br. 19) that since the taxpayers were not individually in the business of buying and selling real estate as was Margolis, it follows that their interests in the realty were capital assets.

In arguing as they do, taxpayers have miscontrued the plain language of this Court in the Margolis case, supra, p. 1009, which, we submit, clearly supports the Government's position with respect to the joint venture theory.

This Court stated therein that (p. 1009):

> By the agreement of June 15, 1956, the trusts acquired a new interest in the property -- a right to share in any gain upon their sale. * * * This right, secured by a trust deed to the property, constituted an interest in the equity of the property itself, which interest in property was held for sale by the trusts.

Because Margolis sold his interests prior to disposal by the trusts to the Navy, this Court further stated that (p. 1009):

> * * * it was proper to disregard the existence of these trusts and to construe the holding for sale as if it were by taxpayer himself and to construe his sale of his beneficial interests as a sale of property held for sale in the ordinary course of his business.

In the Margolis case it was necessary for this Court to in effect separate Margolis' holding from the trusts' holding since he disposed of his beneficial interests in the trusts prior to the time the trusts disposed of the joint interests of taxpayers. All these interests, as this Court stated, were held for sale by the trusts, i.e., the joint venturers composed of Margolis and the several taxpayers. Therefore, the net result is that Margolis and the taxpayers were organized into a joint venture for the purpose of acquiring real estate and for the

purpose of the eventual sale of the real estate to customers in the ordinary course of business. When the sale actually took place it was certainly a sale in the ordinary course of the business of that venture from which ordinary income treatment should ensue.[1/]

For the reasons stated in the Government's opening brief and for those stated above, the judgments of the lower court should be reversed in total and remanded for entry of judgments for the Government.

Respectfully submitted,

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OCTOBER, 1968.

1/ This conclusion would also be true even if contrary to this Court's ruling in Margolis, p. 1009, the trusts i.e., the venturers did not acquire an interest in the land itself, but merely purchased the right to receive income upon the final disposition of the property to the Navy. In such a situation the statutory requisite for a capital gain treatment could not have taken place, i.e., there would have been no sale, and the gain would still be taxable as ordinary income. Pounds v. United States, 372 F. 2d 342 (C.A. 5th). In this latter case the Court observed (p. 346):

> * * * where the taxpayer has only the right to share in the profits that might be realized, [his] interest cannot be treated as a capital asset. The definition of a capital asset must be narrowly applied and its exclusions interpreted broadly in order to effectuate the "Congressional purpose underlying the capital gains provision. Capital gains treatment was intended to relieve the taxpayer from the excessive tax burden on gain resulting from a conversion of capital investment. Corn Products Refining Co. v. Commissioner, 1955, 350 U.S. 46. * * *; Commissioner v. P. G. Lake, Inc., 1958, 356 U.S. 260, 265 * * *.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel, by mailing four copies thereof on this_____ day of October, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

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_____
Wm. Matthew Byrne, Jr.,
United States Attorney.

No. 22,088

IN THE

United States Court of Appeals

For the Ninth Circuit

INDIANA GENERAL CORPORATION,
a Corporation,
Plaintiff-Appellant,

vs.

LOCKHEED AIRCRAFT CORPORATION,
a Corporation,
Defendant-Appellee.

PETITION FOR REHEARING

RODGERS DONALDSON,
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BERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

No. 22,088

IN THE

United States Court of Appeals

For the Ninth Circuit

INDIANA GENERAL CORPORATION,
a Corporation,
Plaintiff-Appellant,

vs.

LOCKHEED AIRCRAFT CORPORATION,
a Corporation,
Defendant-Appellee.

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellee Lockheed Aircraft Corporation hereby petitions this Court for a rehearing of this case, on the ground that this Court's decision filed November 25, 1968 is clearly in error because it is based on the erroneous premise that the ferrite compositions disclosed in the parent application 67,752 and the ferrite compositions defined by claims 1 and 3 of the patent in suit are the same compositions of matter.

SYNOPSIS

Lockheed respectfully requests this Court to reconsider its decision of November 25, 1968 and to do either of the following:

(1) Consider the undisputed fact that the compositions claimed in claims 1 and 3 include compositions *not* disclosed in application Ser. No. 67,752; that consequently the *genus* or group of compositions claimed in claims 1 and 3 is *not* supported by the disclosure of Ser. No. 67,752; that the *Kirchner* case cited by the Court is inapplicable because its holding is limited to a situation in which the compositions of the parent application and the continuation-in-part are the *same;* and that claims 1 and 3 are invalid on the rationale of the *Steenbock, Ruscetta,* and *Sparks* cases discussed hereinbelow; or

(2) Make it clear that this Court's decision does not estop the District Court from entertaining a new motion for summary judgment of invalidity of claims 1 and 3 on the same record, based on the rationale of the *Steenbock, Ruscetta,* and *Sparks* cases.

Lockheed further requests this Court, with respect to claims 2 and 4, to consider the fact that none of the *compositions* which make up the genus of claims 2 and 4 differ *at all* from the compositions of claims 1 and 3, because *all* the compositions encompassed by claims 2 and 4 are also encompassed by claims 1 and 3; and that consequently, this Court's *Cataphote* holding is fully dispositive of claims 2 and 4 on the record as it stands.

ARGUMENT

1. THE COMPOSITIONS OF SER. NO. 67,752 AND OF THE CLAIMS IN SUIT ARE NOT THE SAME.

This Court's opinion is based upon *In re Kirchner,* 305 F.2d 897 (C.C.P.A. 1962) as "squarely in point" (typewritten decision, p. 8, l. 30). The Court's reliance on this case is indicative of the *basic factual misapprehension* underlying the decision of this Court. A basic premise of the *Kirchner* case is that the continuation-in-part application claimed *the same compound* as the parent application and that the new disclosure in the continuation-in-part was merely a new use *of the same compound.*[1]

There is no finding in this record, and there *cannot* be any, that the compositions of matter disclosed in Ser. No. 67,752 are *the same* compositions of matter as those claimed in claims 1 and 3 of the patent in suit. Claims 1 and 3 are *not* claims to magnesium-manganese ferrite as such. Neither are they claims to a specific magnesium-manganese ferrite composition such as Ferramic A-34. They are claims to a *genus* or group of magnesium-manganese ferrite compositions encompassed by range A-B-C-D-E-A (a "family of ferrites" as Indiana terms it in its brief, p. 17, l. 7), of which Ferramic A-34 is *one species.*

The disclosure of Ser. No. 67,752 is a disclosure of *another* (overlapping, see K-L-M-N, Fig. 3 hereof, but nevertheless *different*) genus of which Ferramic A-34 is also a species. However, there are many compositions (including *all* the examples of the patent in suit, see the diagram incorporated in Finding 15, R. 785, or Fig. 3, p. 24 of our appeal brief) which are species of the genus of claims 1

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[1] *Allegheny Ludlum Steel Corp. v. Westinghouse Electric Corp.,* 150 USPQ 95 (D.D.C., 1966), the other case extensively quoted by this Court, is even less in point, because the question there was whether the defining of a specific ingredient proportion range in which a known compound exhibits a certain property *amounts to invention.* In this case the parties, for the purposes of the motion before this Court, agree that it does. Consequently, the issue to which *Allegheny* relates is not before this Court.

and 3 but *not* of the genus of Ser. No. 67,752. The fact that claims 1 and 3 are not restricted to Ferramic A-34 but also claim these new compositions has always been studiously ignored by Indiana and was apparently overlooked by this Court.

The law is clear that the disclosure of one species of composition is not sufficient to support a claim to a whole genus of compositions; yet, on the other hand, the publication (or public use) of one species is sufficient to invalidate a claim drawn to a genus including it: *In re Steenbock,* 83 F.2d 912 (C.C.P.A. 1936).[2]

Therefore, the determining question is simply: Were *all* the compositions of matter encompassed by claims 1 and 3 disclosed in application Ser. No. 67,752? The answer, of course, is obviously "no", and it follows as the night follows the day that the publication and public use, at a fatally early date, of *one* composition (Ferramic A-34) encompassed by these claims invalidates these claims, *regardless* of whether that composition was disclosed in the parent application.

Steenbock was cited with approval by Judge Rich, a recognized authority in the patent field, in passing on essentially the same factual situation in *In re Ruscetta and Jenny,* 255 F.2d 687, 689 (C.C.P.A. 1958). Judge Rich's opinion in this latter case is worthy of close study.

The facts of the *Ruscetta* case were as follows: An application filed in July 1951 disclosed a method of making electrodes by etching tantalum. In a 1955 continuation-in-part application, the applicants presented a) *species claims* to the method as applied to tantalum; b) *generic claims* to the method as applied to this and other metals; and c) species claims to the method as applied to the metals other than tantalum.

The Patent Office *allowed* the *tantalum species* claims, but *rejected* the *generic claims* as barred by a 1953 Brit-

[2]We drew this landmark case, cited to date in 15 appellate-level cases and 24 other reported cases, to the attention of this Court at the oral argument, indicating that we considered it controlling; yet this case is not mentioned in this Court's opinion.

ish publication disclosing only the tantalum species, and rejected the non-tantalum species claims as being mere equivalents of the published tantalum species. (Note the agreement with *Cataphote,* infra).

Adjudicating the generic claims, Judge Rich said:

> "As we have indicated, the situation here involves a one year statutory bar under 35 U.S.C. § 102(b). The *claims* on appeal were *first supported by* and made in an application filed May 9, 1955 and the British specification had been published nearly two years before on May 13, 1953, fully disclosing the invention as applied to tantalum, *a species within the generic claims.* As reiterated in the Steenbock case, it is axiomatic that the disclosure of a species in a reference is sufficient to prevent a later applicant from obtaining generic claims, unless the reference can be overcome, and so the British specification disclosing the species tantalum, published over a year before appellants filed their *generic* disclosure is clearly a statutory bar to the granting of the *generic claims.*"
>
> * * *
>
> "There is one *fundamental* which appellants consistently overlook, namely, that what they are here *claiming* was first disclosed and claimed by them in their third application and that they are entitled to no date, *as to this subject matter,* earlier than May 9, 1955 when that application was filed. Copendency with earlier filed applications disclosing **different subject matter, viz. the tantalum species of the invention only,** avails them nothing on the appealed claims. It is of significance *only as to the tantalum species.* Antedating the reference *as to this species* does not remove it from the category of a printed publication, published in 1953." (Most emphasis ours)

The Patent Office Board of Appeals unhesitatingly affirmed the Examiner's application of the *Steenbock* rationale to claims of the range-of-ingredient-proportion type in *Ex parte Sparks and Turner,* 128 USPQ 200, 201 (1952).[3]

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[3]This case was also cited to this Court at the oral argument as controlling; yet again, this Court made no mention of it in the opinion.

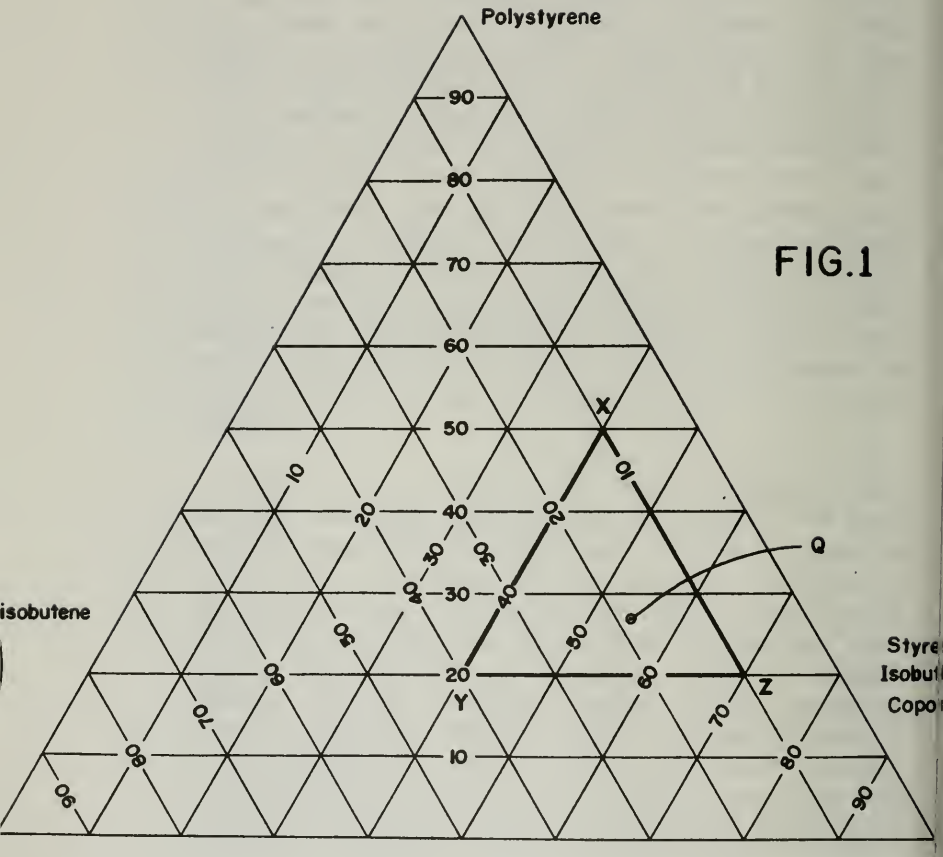
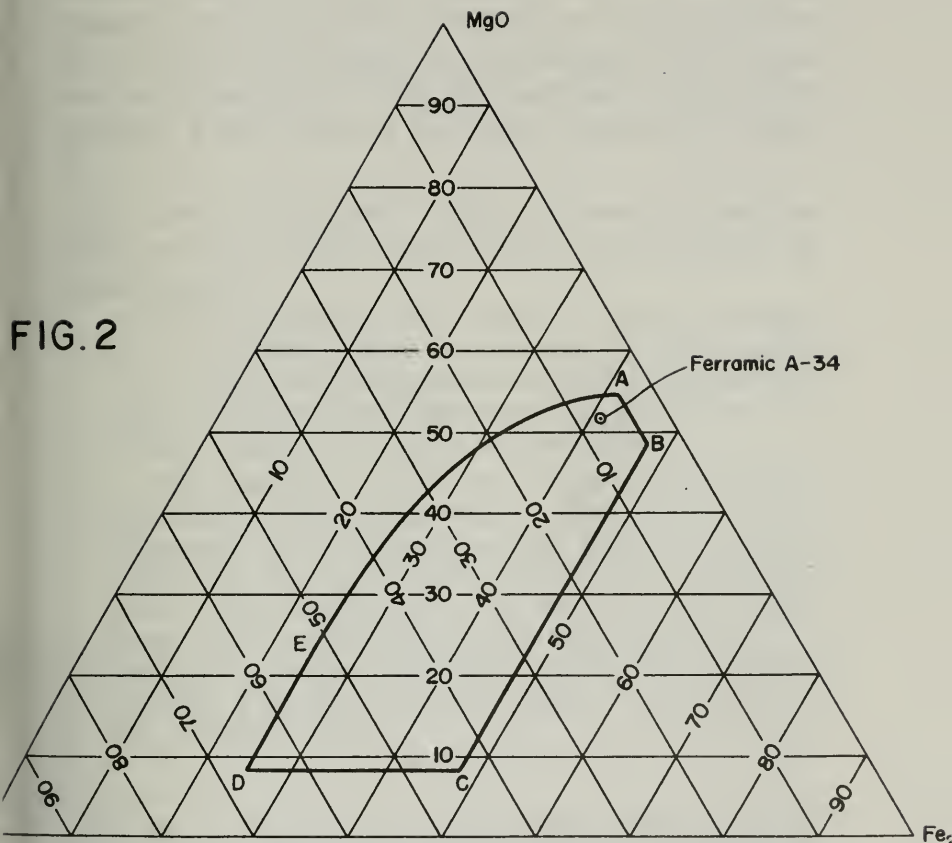

Polystyrene
90
80
70
60
50
40
30
20
10
X
Y
Z
Q
10
20
30
40
50
60
70
80
90
isobutene
Styre
Isobutle
Copo

FIG.1

FIG. 2


MgO
90
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Ferramic A-34
A
B
C
D
E
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In that case, the parent application disclosed essentially the composition Q shown on the triaxial diagram of Fig. 1 hereof. The same composition was subsequently published in a British patent.[4] Claim 1 of the continuation-in-part application, which the Board adjudicated, was a range-of-ingredients claim which, when plotted on the triaxial diagram of Fig. 1 hereof, can be seen to be generic to the compositions encompassed within the area X-Y-Z. (Note the similarity in relationships between composition Q and area X-Y-Z, and between Ferramic A-34 and area A-B-C-D-E-A of the patent in suit, Fig. 2 hereof.)

The Board held Sparks' claim 1 (among others) invalid over the British patent under the *Steenbock* rationale, saying:

> "The appealed claims relate to plastic compositions comprising three components in stated ratios . . . . These three components are: polymorized (sic) styrene, polymerized isobutene, and a copolymer of stated amounts of styrene and isobutene.
>
> "The claims have been rejected on the British patent which is said to constitute a statutory bar to the allowance of the claims on appeal. The British patent represents the same subject matter as that embodied in an earlier application filed by the present appellants, which was copending with the present case, . . . Neither the earlier application nor the British patent included a disclosure of the range of proportions of the appealed claims . . .
>
> * * *

[4]We deduce this from the Board's statement that "The earlier application, Ser. No. 504,724 and the British patent disclosed subject matter corresponding to that of allowed claim 4." (p. 201) Claim 4, "the only (allowed) claim in the case", is now the single claim of U.S. patent No. 2,618,624 and reads as follows: "Composition consisting essentially of about 27.3% by weight of polystyrene having a Staudinger molecular weight of about 80,000 to 130,000 about 18.2% by weight of polyisobutane having a Staudinger molecular weight of about 100,000, and about 54.5% by weight of a styrene-isobutylene copolymer having about 50% by weight of combined styrene and having a Staudinger molecular weight of about 100,000, said composition being substantially homogenous and having a flow of less than 5% at 85° C."

> "The claims on appeal are obviously not supported by and *could not have been made* in the earlier case. Appellants must therefore rely on the filing date of the present case for that subject matter. Under the circumstances theBritish patent, *which discloses an example coming within the terms of the claims,* constitutes a statutory bar as a publication and as a patent for the claims on appeal. . . ." (Emphasis ours)

It is interesting that the Board so held *even though* the claimed utility (homogeneity and low flow) was the *same* for the genus claim as for the published species! *A fortiori* is the *Sparks* rule applicable to the case at bar, in which, as Judge Hall took great pains to emphasize, the genus claimed in the patent in suit *arose out of a different concept* than did the genus disclosed in Ser. No. 67,752.

Helene Curtis v. Sales Affiliates, 233 F.2d 148, 152 (C.A.2, 1956), affirming 121 FS 490, cert. den. 77 S. Ct. 101, reh. den. 77 S. Ct. 260, in applying *Steenbock* as "elementary", assumed without discussion that a range was the genus of all the compositions within the range.

Besides, Indiana concedes this point by calling the square-loop area "a family of ferrites".

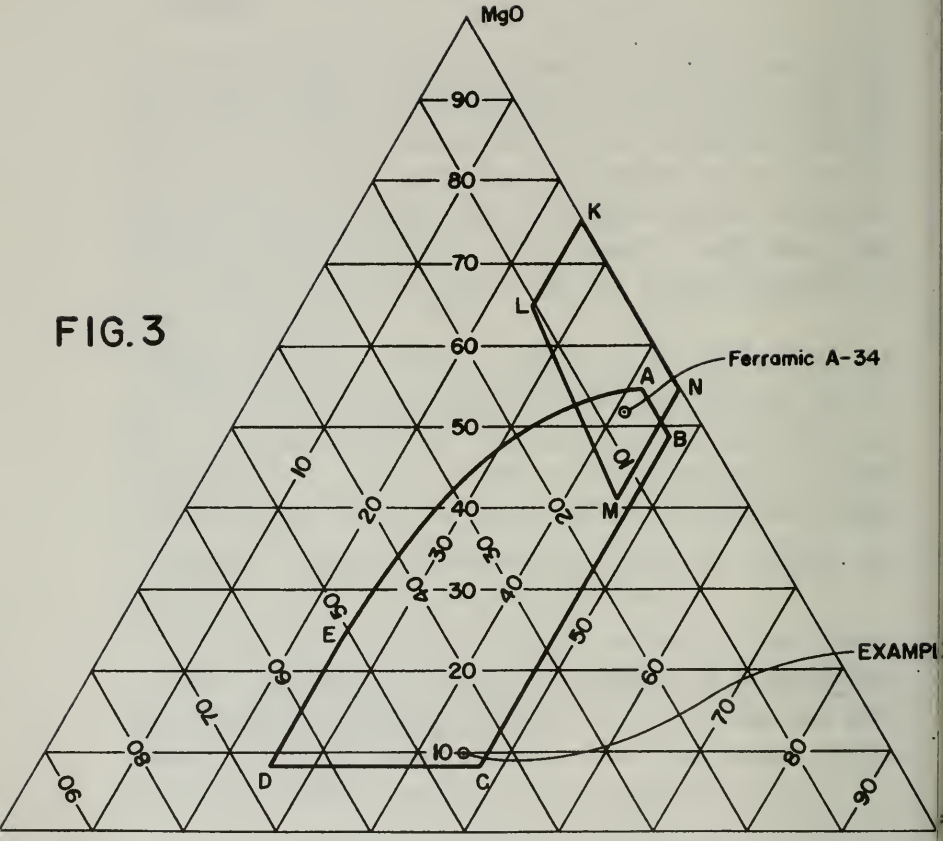
We therefore reiterate our basic contention that **claims 1 and 3, because they encompass species of compositions not disclosed in Ser. No. 67,752, which species are new matter under any theory, cannot obtain the benefit of the 1948 filing date,** according to well-established law.[5]

2. JUDGE HALL WAS JUSTIFIED IN HOLDING THAT SQUARE-LOOPNESS IS AN INTEGRAL PART OF THE CLAIMS IN SUIT AND HAD TO BE DISCLOSED IN SER. NO. 67,752.

We have demonstrated above that claims 1 and 3, being broader in scope than the disclosure of Ser. No. 67,752, would be invalid *as a matter of law* even if the square-

[5]We raised this point (though without citing these authorities) before Judge Hall at R. 490, ll. 1-30 and R. 659, ll. 14-26.

FIG. 3


MgO
90
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K
L
A
N
B
M
Q
Ferramic A-34
EXAMPL
E
D
C
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90

loopness of Ferramic A-34 had been disclosed in the parent application.

But the failure of Ser. No. 67,752 to disclose the *claimed* square-loopness adds a further ground of invalidity as a matter of law. In *In re Soll,* 97 F.2d 623, 625 (C.C.P.A. 1938), the court said:

> "We think the rule is well settled that in a chemical case where an applicant discloses that one species of a class of chemicals will accomplish a certain purpose without naming any others of the class to which it belongs or *without so describing the species and its mode of operation as to call attention to the fact that other members of the class are its equivalents and will perform the same function, he is not entitled to broaden the scope of his disclosed invention by claiming the whole group,* even though those skilled in the art may know that in some respects at least the different members of the group are equivalents. * * *" (Emphasis ours)

Judge Hall precisely so held (R. 772, ll. 24-26).

In *In re Dreshfield,* 110 F.2d 235, 240 (C.C.P.A. 1940), the court was even more explicit:

> "It is well settled that in cases involving chemicals and chemical compounds *which differ radically in their properties* it must appear in an applicant's specification 'either by the enumeration of a sufficient number of the members of a group or by other appropriate language, that "the chemicals or chemical combinations"' included in the claims *are capable of accomplishing the desired result.* * * *" (Emphasis ours)

This Court is in error in interpreting *Hegyi v. Albers-Schoenberg,* 280 F.2d 859 (C.C.P.A. 1960), as holding that square-loopness is not an integral part of the definition of the invention in the claims in suit. When the passage quoted by the Court is taken *in context,* it becomes quite clear that *Hegyi* holds just the opposite.

Hegyi contended that the disclosure of Example E (Fig. 3 hereof) in the application for the patent in suit

here did not constitute a constructive reduction to practice of claim 5 of the patent in suit (a claim not involved in this case but also directed to "a ferromagnetic ferrite body having a substantially square hysteresis loop . . .") because the loop of Example E was not square *enough* to be used in computers. The Court of Customs and Patent Appeals held that the claim *required* only *substantial* squareness and not any particular *degree* of squareness.

Judge Rich specifically said at p. 862 of 280 F.2d:

> ". . . we think the following statements by the examiner in his decision on motions, dated April 15, 1957, are relevant to construing the scope of the count.
>
> * * *
>
> " '. . . in view of the preamble of the count, **it is held that the ferrites defined in the present count are identified by composition and its inherent properties, namely—"square or rectangular hysteresis loop".**' "

This is a *vital* distinction over the *Kirchner* case, in which

> "the appealed claims all describe compounds per se, *with no reference to their use.*" (p. 898, emphasis ours)

Hence, we submit, Judge Hall was right in considering square-loopness to be an *integral part* of claims 1 and 3 which cannot be simply disregarded, notwithstanding the fact that claims 1 and 3 would be invalid even if it *were* disregarded.

The disputed Finding 34, R. 789, is therefore clearly correct.

3. NO PRIOR ART IS INVOLVED.

We have always used the Snoek reference (R. 657-8, R. 669-70, and Lockheed's appeal brief, pp. 17-19 and 38) for no other purpose than to *emphasize* that the invention is not just *any* magnesium-manganese ferrite (which Snoek shows), but magnesium-manganese ferrites *having*

certain specific ingredient proportions determined by stated properties (which Snoek does not show).

Our argument is equally valid with or without the Snoek reference, and we submit that Snoek raises no question of prior art which would defeat summary judgment.

4. CLARIFICATION OF THIS COURT'S HOLDING IS NEEDED IN ANY EVENT.

We submit that inasmuch as the result reached by Judge Hall is unquestionably correct at least as to claims 1 and 3, this Court would subject the parties to needless expense by remanding the entire case to Judge Hall instead of using that rationale to hold at least claims 1 and 3 invalid as a matter of law on the undisputed facts before this Court.

If this Court still feels that Judge Hall held claims 1 and 3 invalid for the wrong reason, and if this Court is not disposed to affirm the judgment as to these claims on the basis of the right reason, then we respectfully request this Court to clarify its holding at p. 15, ll. 25-28 so as to make it clear that Judge Hall, upon proper motion, could deny Indiana the benefit of the 1948 date for claims 1 and 3 *on the basis of the Steenbock, Ruscetta, and Sparks rationale.* (As this Court's decision now stands, it might lead the reader to believe that this Court intended to convey that *claims* 1 and 3 are entitled to the 1948 filing date under *any* rationale.)

5. THE MATTER OF CLAIMS 2 AND 4.

This Court has decided, in essence, that *Cataphote Corp. v. De Soto Chemical Coatings, Inc.,* 356 F.2d 24 (C.A. 9, 1966) would not be applicable to invalidate claims 2 and 4 unless the *compositions* encompassed thereby differed only in degree from the *compositions* of claims 1 and 3.

None of the *compositions* which make up the genus of claims 2 and 4 (area C-G-H-I of Fig. 4 hereof) differ from the *compositions* of claims 1 and 3 (area A-B-C-D-E-A) *at all! All* the compositions encompassed by claims 2 and 4 are *also* encompassed by claims 1 and 3.

The only material way in which the genus of claims 2 and 4 (taken as a genus) *can* differ from the genus of claims 1 and 3 is in the square-loop property, i.e., the property which gave rise to the genus in the first place, and which is an integral part of all four claims. This Court does not appear to challenge the sufficiency of the record to establish that any differences in square-loopness were indeed only a matter of degree.

We submit that *Cataphote* is even more applicable to the composition comparison than it is to the square-loopness comparison, and that it is applicable in any event on the clear facts of the record *without any testimony whatsoever.*

CONCLUSION

Reconsideration of this Court's decision and affirmance of the District Court's judgment, or at least clarification of this Court's decision, is respectfully requested.

Dated, December 23, 1968.

Respectfully submitted,
RODGERS DONALDSON,
MELLIN, HURSH, MOORE & WEISSENBERGER,
OSCAR A. MELLIN,
By HARRY G. WEISSENBERGER,
Attorneys for Defendant-Appellee.

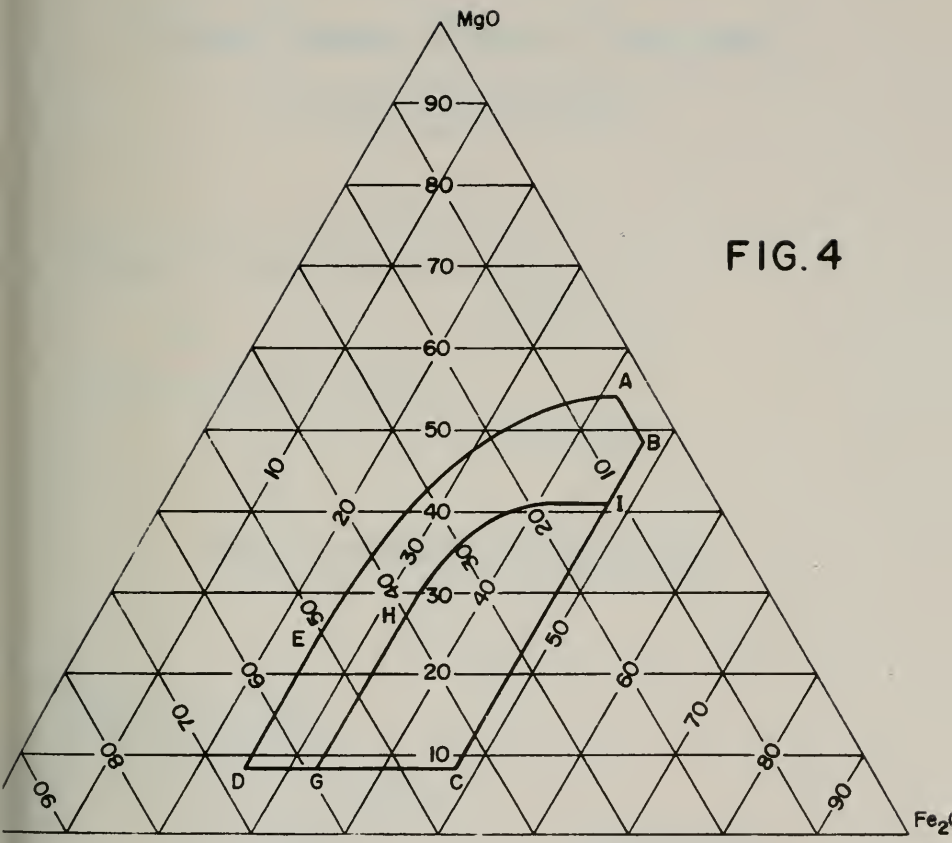

FIG. 4

No. 22,108

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMANUAL BLAZ MRKONJIC-RUZIC,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR REHEARING

GREGORY S. STOUT,
220 Montgomery Street,
San Francisco, California 94104,
Attorney for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 22,108

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMANUAL BLAZ MRKONJIC-RUZIC,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR REHEARING

On October 24, 1968 this honorable Court considered the grounds for reversal urged by appellant in the above entitled case. In its opinion the Court found *inter alia* that:

> "Appellant was not deprived of a fair trial by reason of the District Court's *response* to *provocative conduct* on the part of appellant's trial counsel." (Emphasis ours)

This finding refers to action and statements of the District Court described on pages 9-13 of appellant's opening brief.

Judgment was affirmed.

I

THE TRIAL JUDGE MUST BE AND REMAINS IMPARTIAL.

Even an *appearance* of bias may fatally infect the proceedings.[1] This task is not an easy one.

> "A judge, at least in a Federal Court, is more than a moderator . . . Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that, in the end, depends primarily upon the judge."[2]

The trial judge must be patient and "not be thrown off balance by provocations which frequently occur during a trial." In an Illinois case, the Court says: "It is essential that jury trials shall be managed fairly, and that trial judges shall not only be just to both sides, but that they shall conduct themselves in such a manner that an impartial state of mind is apparent to all concerned."[3]

> "The Judge presiding at a trial should maintain an impartial attitude. He must appear neutral, and exercise patience toward the participants. The judge should not be thrown off balance by those *provocations* which a trial contest can be expected to produce. Even if exposed to *great provocation,* the trial judge is not thereby justified in accusing a party's lawyer of unfairness or in holding him up to contempt before the jury, and should not show hostility to him or otherwise treat the attor-

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[1] *Bollenbach v. United States,* 326 U.S. 607; *Wilson v. United States,* 250 F.2d 312.

[2] *Brown v. Walter* (C.C.A., 2, Vt., 1933), 62 F.2d 798, 799-800 (1933). This statement was made by the late Judge Learned Hand, speaking for the Second Circuit.

[3] *People v. Marino,* 414 Ill. 445, 111 N.E.2d 534, 538 (1953).

ney so as to prejudice the interests of his client. The required administration of the trial and necessary control of conduct of counsel can and should be performed effectively without inflicting unnecessary damage to a party's cause."[4] (Emphasis ours)

"The real object of a trial is to secure a fair and impartial administration of justice between the parties to the litigation. The responsibility of striving for an atmosphere of unpartiality during the course of a trial rests upon the trial judge. His conduct in trying a case must be fair to both sides, and he should refrain from remarks which might injure either of the parties to the litigation."[5]

II

DETERMINATION OF THE QUESTION WHETHER THE TRIAL JUDGE HAS OVERSTEPPED THE BOUNDS OF JUDICIAL PROPRIETY MUST BE MADE ON A CASE-TO-CASE BASIS.[6]

There are certain principles which can serve as guides to measure judicial conduct.[7] Among them are:

(1) Harrassment of defense counsel, prejudicial to his client—and this can take many forms—may also require a new trial. For example, the Court may not hamper or embarrass coun-

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[4]*Skelton v. Beall* (Fla.), 133 So.2d 477, 481 (1961).

[5]*Hanzen v. St. Paul City Ry. Co.*, 231 Minn. 356, 43 N.W.2d 260, 264 (1950).

[6]*Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232.

[7]*Herron v. Southern Pacific Co.*, 283 U.S. 91.

sel in the conduct of the defense by disparaging remarks or rulings which prevent counsel from effectively presenting his case or from obtaining full and fair consideration of that case by a jury.[8]

(2) A trial judge should never reprimand or censure counsel in the presence of the jury. "Trial Courts should proceed with dignity, rule impartially, and say as little as possible in the trial."[9] Trial attorneys "owe to the Court, because of the position he occupies, the utmost deference and respect," but, "the court owes to them an equal obligation of courtesy and consideration. . . . In the heat of a trial sharp differences of opinions do arise and things are said which would have been better left unsaid."[10] This does not justify the reprimanding of counsel in the presence of the jury.

(3) "The trial judge should use only such language as is essential to the requirements of the situation and should not belittle counsel's argument or cast unwarranted reproaches on counsel. In the eyes of the jury, counsel and client are so closely identified that a trial judge's belittling of counsel is often prejudicial to the client."[11]

Quite often, what appear to be routine comments by the Court, when viewed independently are insuffi-

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[8]*People v. Becker,* 210 N.Y. 274, 104 N.E. 396; *People v. Kepner,* 267 App. Div. 838, 46 N.Y.S.2d 111; *People v. Adler,* 274 App. Div. 820, 80 N.Y.S.2d 210.

[9]*Kent v. State,* 53 Okla. Crim. 276, 10 P.2d 733 (1932).

[10]*Goldstein v. United States* (C.C.A., 8, 1933), 63 F.2d 609, 613.

[11]*Weinberg v. Pavitt,* 304 Pa. 312, 155 Atl. 867, 871 (1931).

cient to warrant reversal. But when the record is reviewed in its entirety by an Appellate Court, the trial Court's remarks may, in the aggregate, reveal a clear and consistent pattern of judicial bias.[12]

In short, an attorney is entitled to treatment from the trial judge that will not prejudice the rights of his client. This is a matter of right, not of indulgence.[13]

Appellate Courts are exceedingly reluctant to reverse cases because of the misconduct of the trial judge. They are more inclined to recognize the misconduct, but pardon the judge on the theory that the misconduct was not shown to prejudice the jury, which can rarely be done. This affords the litigant no relief. It is "like a rapier thrust in a vital spot, then withdrawing the blade with apologies."[14] The correction for this widespread and well-recognized problem rests almost entirely with the judiciary. Constructive criticism never hurts anyone and may help. "Let justice be done lest the Heavens fall."[15]

In the light of the foregoing, it is urged that the District Court did in fact deny to this appellant his

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[12]*Sunderland v. United States,* 19 F.2d 202; *People v. Becker, supra,* note 8; *Commonwealth v. Fields,* 171 Pa. Super. 177, 90 A. 2d 391; *State v. Phillips,* 59 Wash. 252, 109 Pac. 1047; *Robertson v. State,* 38 Tex. 187.

[13]*Grock v. United States,* 298 Fed. 544.

[14]*Brotherhood of Railroad Trainmen v. Brown,* 170 Okla. 67, 38 P.2d 529, 532 (1934).

[15]Remarks of Chief Judge Harold M. Stephens at the laying of the cornerstone of the United States Courthouse for the District of Columbia, December 25, 1950.

right to a fair trial, and rehearing and redetermination of this issue is requested.

Dated, San Francisco, California,
November 7, 1968.

Respectfully submitted,
GREGORY S. STOUT,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I, Gregory S. Stout, counsel for the petitioner certify that the foregoing petition for rehearing is well founded for the reasons set forth above. I further certify that this petition for rehearing is not interposed for delay.

GREGORY S. STOUT,
Attorney for Appellant and Petitioner.

No. 22123

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SKI POLE SPECIALISTS, INC., a corporation,
Plaintiff-Appellant,

-vs-

ROBERT J. McDONALD,
Defendant-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

APPELLANT'S PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SKI POLE SPECIALISTS, INC., a corporation, Plaintiff-Appellant, -vs- ROBERT J. McDONALD, Defendant-Appellee.	)	No. 22123 APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions this Honorable Court for a rehearing on the above entitled cause pursuant to the provisions of Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit:

I.

Appellant respectfully urges that certain of the testimony has been overlooked by this Honorable Court in arriving at the logic upon which this Court based its Opinion. The Court at Page 4 of its Opinion in the second paragraph thereof concluded that the use of the word "unlawfully" identified and distinguished this Notice as being something other than a Notice of Infringement and stated that if a licensee "failed to pay royalties called for by the License Agreement, its employment of the invention could be said to be unlawful on that independent ground". The Court then took cognizance of substantially identical notices sent by McDonald to A & T Ski Company and others (Plaintiff's Exhibit 47). The Court concluded that as to them "the notice was probably intended only as a warning for the future and an announcement that the patent had at last issued." This conclusion is clearly contradicted by the record. This was apparently

overlooked by the Court. Appellee's counsel, Mr. Henry, upon cross-examination of Mr. Woodward, Vice President of A & T, relative to the Notice (Plaintiff's Exhibit 47) made this statement at Page 43, Transcript:

> "Q Well, you received a notice of infringement. This has been established and it is admitted by our side that Anderson-Thompson received a notice of infringement."

Later (Page 78, Transcript) Appellee himself in response to cross-examination relative to other Notices of Infringement, responded with the following question:

> "A At the time the infringement notice introduced in evidence was sent to Anderson & Thompson?"

We respectfully submit, therefore, that insofar as the logic of the Court may be grounded upon the conclusion that the Notice was sent to other manufacturers was not a Notice of Infringement that the statements of Appellee and Appellee's attorney hereinbefore quoted from the record have been overlooked.

II.

This Honorable Court concluded in Footnote 4 of its Opinion, among other things, that Appellant had not repudiated its License. Appellant suggests that this conclusion overlooks certain testimony found in the record and a stipulation of counsel likewise found in the record. This testimony and the stipulation apparently overlooked by the Court discloses that there was a repudiation by reason of the fact that Appellee had brought suit on the License Agreement against Appellant to collect royalties. The following stipulation relative to Plaintiff's status at the time notice was sent appears at Page 282, Transcript:

> "MR. WEBB: I can stipulate to the status of the case.
> THE COURT: Perhaps counsel can agree and that might be more helpful.
> MR. DONART: On the 30th of August, 1965, the plaintiff's case

had been put in. A motion for involuntary dismissal had been made by the defendant, at that time it was this witness individually; that thereafter and prior to the 30th of August, 1965, the plaintiff therein had filed the motion seeking to bring in Ski Pole Specialists, Inc., and Precision Ski Pole Manufacturing Company as defendants and that the Court had not ruled on either of those motions. I think that is probably as far as necessary.
MR. WEBB: So stipulated."

We likewise suggest that in arriving at this conclusion the Court overlooked the uncontradicted testimony of the witness Scott, President of Appellant at Pages 260 and 261, Transcript:

"Q At any time did the corporation advise Mr. McDonald that it felt that it was no longer bound by the Agreement?
A Not by words, I think perhaps by our actions.
Q In other words, by defending yourselves in the State Court action?
A Considerably before that by ceasing performance."

We respectfully submit, therefore, that in view of the foregoing stipulation of counsel and testimony of the witness Scott that it cannot logically be said that there was not a repudiation even if we assume that Appellant was in fact at that time a Licensee.

III.

Appellant respectfully submits that this Honorable Court has failed to consider the fact that Appellant could not by its own unilateral action place itself in the status of licensee. We direct attention to Paragraph 7 of the License Agreement which was not brought to the attention of the Court in either of Appellant's Briefs previously wherein it states:

"7. The Licensee shall not assign this License, or any part thereof, or grant any sub-licenses to any person, without the consent in writing of the Licensor, and the Licensor shall have the option to terminate this License Agreement in the event of the death or incapacity or insolvency of the Licensee."

The Licensee therein named is Edward L. Scott and not Appellant. Scott could not assign to Appellant without the consent of Appellee. The evidence failed to establish either an assignment or any consent given by Appellee to such an assignment. The Court after hearing all of the evidence found that Appellant was the alter ego of Scott, the licensee. This is a status that Appellant could not have established by its unilateral action. Appellant respectfully urges, therefore, that it could only regard itself as an accused infringer upon receipt of the Notice in question. It knew Appellee had not given his concent. Appellant had not received an assignment and could not receive an assignment without the consent of Appellee because of the requirement contained in Paragraph 7 of the License Agreement.

IV.

Appellant respectfully submits that this Honorable Court failed to consider and distinguish the Landmark Case from the Supreme Court of the United States of Edward Katzinger Company vs. Chicago Metallic Manufacturing Company (1947) 329 U.S. 394, 67 S.Ct. 416, 91 L.Ed 374, wherein a virtually identical situation presented itself. In that case plaintiff was in fact a named licensee. It, nevertheless, commenced that action, like this, under the Declaratory Judgments Act after having terminated the License. It refused to pay further royalties. The only controversy was the validity of the patent. Such a controversy over the validity of the patent certainly existed in the instant case. The trial court held that the plaintiff was estopped by the License Agreement to attack patent validity. This was reversed by the Circuit Court of Appeals by reason of the presence of a price-fixing provision in the License Agreement which the

Circuit Court held was not severable and could therefore not be avoided even though it had not been enforced. This was affirmed by the Supreme Court of the United States. This case is fully discussed in both of Appellant's Briefs.

In conclusion, therefore, Appellant respectfully urges that it was neither a licensee or an assignee of the licensee at the time the Notice was sent; that it was entitled to regard the same as an accusation of infringement; that it was entitled to interpret the Notice in the same way that A & T Ski Company, Appellee and Appellee's counsel interpreted a substantially identical Notice sent to A & T Company; that if Appellant was in fact a licensee, it had by its actions repudiated the license; that it should be permitted to attack the validity of the patent by reason of the price-fixing provision in the License Agreement.

Appellant further respectfully urges that the above entitled matter should be reheard by reason of the fact that at the time of the initial hearing Appellant's Reply Brief had not been placed before the Court and that a rehearing upon the propositions herein set forth with all Briefs of both parties before the Court at said hearing would permit full and complete consideration of all matters herein set forth.

Respectfully submitted,

SEED, BERRY & DOWREY
Residing at 1502 Norton Building
Seattle, Washington 98104

DONART & DONART
Residing at Weiser, Idaho

Attorneys for Appellant

By James B Donart

CERTIFICATE OF COUNSEL

I, James B. Donart, one of the attorneys for the Appellant in the above entitled action do hereby certify and declare that the within and hereunto attached Petition for Rehearing is in my judgment well founded and the same is not interposed for the purpose of effecting any delay.

Dated this 29th day of November, 1968.

James B Donart

CERTIFICATE OF SERVICE

A true copy of the foregoing Appellant's Petition for Rehearing has been sent to Lloyd J. Webb of Rayborn, Rayborn, Webb & Pike, P. O. Box 321, Twin Falls, Idaho 83301, and Robert J. Henry, 155 Montgomery Street, San Francisco, California 94104, as attorneys for Appellee, by United States mail, postage prepaid this 29th day of November, 1968.

James B Donart

No. 22,128

United States
COURT OF APPEALS
for the Ninth Circuit

MELVIN JACK TURNER, Bankrupt,

Appellant,

v.

JULIA L. BOSTON, Trustee in Bankruptcy, and VALLEY CREDIT SERVICE,

Appellees.

Appeal from the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLANT

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Attorney for Appellant

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-67

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United States
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Appellees.

Appeal from the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Bankrupt filed his voluntary Petition in Bankruptcy and received a discharge in 1958. In 1963 he filed a second Petition in Bankruptcy, but was denied a discharge because it was filed within six years of the previous petition. On November 14, 1966, and six years after his first discharge in bankruptcy, bankrupt filed the third Petition in Bankruptcy and in-

cluded in said petition the debts which had previously been scheduled in the petition filed in 1963, with said petition setting forth separately those debts previously scheduled and noting that a discharge had been denied as to them. The Referee in Bankruptcy denied a discharge of those debts which had been listed in the second petition on the ground that the denial of a discharge in 1963 was res judicata, which opinion was affirmed on appeal by the District Court.

The legal question raised by this appeal is whether a petitioner may obtain a discharge after a period of six years has elapsed from a previous discharge where an intervening petition in bankruptcy has been filed and the petitioner denied a discharge upon the sole ground that his petition was premature and within the six year limitation under Section 14 (c) (5) of the Bankruptcy Act, as to those debts on the present petition which were included in the previous petition for which a discharge was denied.

SUMMARY OF ARGUMENT

There is a sharp conflict upon the question whether the denial of a discharge upon the ground of a prior discharge within six years operates as a bar to the discharge of the same debts in a third proceeding. 9 Am. Jur. 2d, Section 687, P. 514. It is held on the one hand that the principal of res adjudicata applies to the denial of a discharge irrespective of the ground of opposition made to the discharge, and that a discharge cannot be had in a bankruptcy proceeding

from debts which were provable in a prior proceeding in which a discharge was denied on the ground of a prior discharge within six years. *Chopnick* v. *Tokatyan* (C.A. 2) 128 F.2d 521. Other courts have taken the view that the principal of res adjudicata does not apply if the denial of a discharge was on the sole ground of a prior discharge within six years. The result of this view is that the denial of a discharge on such ground does not preclude the discharge in a third proceeding from debts which were provable in the second proceeding. P*rudential Loan & Finance Co.* v. *Robarts* (C.A. 5) 52 F.2d 918; *In the Matter of Charles S. Masterson, f.d.b.a. Prune-Rite Mfg. Co.*, (U.S.D.C., N.D. California, S.D.) 240 Fed. Supp. 543; 1 Collier on Bankruptcy, 14th Edition p. 1422.

ARGUMENT

1. The court erred as a matter of law in ruling that petitioner be denied a discharge in bankruptcy as to those debts listed in a prior bankruptcy filed October 18, 1963, said prior petition having been filed within six years of a previous discharge in bankruptcy, under Section 14 (c) (5) of the Bankruptcy Act.

I submit to the court that the proposition of the denial of a discharge based upon the proposition of res adjudicata is untenable. I submit that the issue in the prior petition is not the same issue as is involved in the present petition. The only issue involved in the prior petition where the discharge was denied was whether the petition had been filed within the six year time limitation. The identical same issue is

not in question at this time. In 45 Har. L. Rev. 1110, the author states that "If a discharge had been denied because of the prior discharge in bankruptcy within six years, the issue would be res adjudicata against the bankrupt only as to the particular defense raised, and this should no longer avail due to its temporary nature."

A review of the cases will reflect that the origination of the rule as reflected in the *Chopnick* case arose from the situation where a petitioner would fail to request a discharge. The bankrupt would file a petition in bankruptcy within the six year time limitation period and then fail and neglect to request a discharge. By this means he was able to in effect have a stay enforced against his creditors as often as he wished. Then he would again file a petition in bankruptcy after the six year period had elapsed and apply for the discharge. It was upon this set of facts that the rule originated denying the discharge. This situation cannot prevail today because of the change in the law with regard to the manner of the entry of the order of discharge.

Oglesby in his volume "Some Developments in Bankruptcy Law" (1943) reported in 18 Journal of National Association of Referee's 9, 10, reports the rule as followed in the *Chopnick* case as involving "too harsh a penalty."

I believe that the thinking of our Circuit Court of Appeals on this matter is indicated in the recent case of *In re Mayorga*, 355 F.2d 89 (1966) wherein

the court states as follows: "Section 14 (c) (5) is not in pari materia with the other six items of paragraph (c). It describes no wrongful act on the part of the bankrupt. It merely prescribes the six year interval which must elapse between discharges." To the same effect is the *Roberts* case which stated as follows: "The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other grounds set forth in Title 11, USCA Section 32 (b). The other grounds all involve reprehensive conduct of the bankrupt which Congress intended to punish by a perpetual refusal to discharge him from the claims of his then creditors. The purpose in adding the ground relating to a prior discharge within six years was not to punish, but only to postpone a second discharge for that period of time. An ill-advised voluntary adjudication, or an involuntary one on acts of bankruptcy which do not also defeat discharge, had within five years of the granting of a prior discharge, and on which no discharge can possibly be granted, was not intended to result in making the provable claims of creditors bankruptcy proof forever. Such a construction would tend to defeat one of the main purposes of the act, to-wit: The relief of honest debtors to surrender their property to their creditors. This provision of the act as it stood in 1927 makes no distinction between voluntary and involuntary bankruptcies, and the construction contended for would enable creditors of an insolvent, by obtaining a judgment or attachment, or taking advantage of some

other innocent act of bankruptcy within five years from a prior discharge, to obtain the benefits of bankruptcy for themselves, without possibility of the debtor, however honest, obtaining a discharge from their claim then or at any time in the future. We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years." I submit to the court that the decision of the referee in this matter denying your petitioner relief acts as a knife and not as a two edged sword. It denies your petitioner relief upon making an honest mistake, and yet at the same time leaves him open to the same result, a perpetual refusal to allow your petitioner the relief of a court of bankruptcy, upon an involuntary petition in bankruptcy. That is, the rules should operate in both a voluntary and involuntary bankruptcy petition, and if so, the rule obviously is unjust when applicable in the involuntary proceeding.

There is nothing in this proceeding, nor is there anything in the record of the former proceeding, to indicate that the early filing was anything other than an honest mistake of the petitioning bankrupt. Upon this basis then I respectfully urge the court to reverse the decision of the referee and grant to your petitioner the relief requested. Although the referee in his Order Denying Discharge of Specific Debts has indicated that a petitioning bankrupt upon discovery of the fact that he has filed prematurely may

petition the court for a dismissal of his bankruptcy petition without prejudice, I find no such relief allowed by the statutes. Such relief not being available under the statutes I do not believe that the bankrupt petitioner can be condemned for not following this avenue of relief. Also, it would appear that a creditor could object to such dismissal in which case the dismissal would not be allowed and the bankrupt would be forever precluded from obtaining a discharge as to the debt listed in his petition. I submit that the decisions which do not allow the relief requested in this petition are being unfairly harsh upon the petitioner and much too lenient in favor of the creditors.

CONCLUSION

The decision of Judge Belloni and Referee Folger Johnson Jr., should be reversed and the bankrupt granted a discharge as to those debts listed in the present petition which were previously listed in his bankruptcy petition filed October 18, 1963, upon the grounds and for the reason that the prior refusal of a discharge does not preclude the bankrupt from receiving relief herein.

Respectfully submitted,

DONALD D. MCKOWN
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD D. MCKOWN

No. 22128

United States
Court of Appeals
for the Ninth Circuit

MELVIN JACK TURNER, Bankrupt,

Appellant,

v.

JULIA L. BOSTON, Trustee in Bankruptcy, and VALLEY CREDIT SERVICE,

Appellees.

Appeal from the United States District Court
For the District of Oregon

THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLEES

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United States
Court of Appeals
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Appellees.

Appeal from the United States District Court
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THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The findings of fact, made by Referee Johnson in his order dated March 6, 1967 and not disputed by Appellant, are substantially as follows:

1. On January 27, 1958 in the United States District Court for the Northern Division of the Western Division of Washington, bankrupt Melvin Jack Turner filed a voluntary petition (No. 44075) and received a discharge in such proceeding.

2. On October 18, 1963, the United States District Court for the District of Oregon, the bankrupt filed a voluntary petition in bankruptcy (B63-3045) but, by order dated December 24, 1963, the bankrupt was denied a discharge in such bankruptcy on the ground that he had been granted a discharge in a former bankruptcy proceeding commenced within six years prior to the date of the filing of the petition of October 18, 1963.

3. On November 14, 1966, the bankrupt filed his third voluntary petition in bankruptcy listing therein all the debts on which discharge had been denied in the order of December 24, 1963.

4. Denial of the discharge in the October 18, 1963, proceeding might have been avoided by the bankrupt by the way of a voluntary withdrawal of his bankruptcy proceeding without prejudice, but bankrupt failed to file any petition asking for such withdrawal and for the setting aside of his adjudication in such proceeding.[1]

[1] Based upon the foregoing findings of fact, Referee Folger Johnson, Jr. ruled that the dischargeability of the debts listed in the petition of October 18, 1963, had been determined and denied by order of the United States District Court for the District of Oregon in Bankruptcy dated December 24, 1963. Inasmuch as the dischargeability of the above described debts had been determined by a court of competent jurisdiction and no appeal had been taken from the determination of that court, it was Referee Johnson's conclusion that the matter was res judicata as determined by the above mentioned court.

LEGAL QUESTION RAISED BY THIS APPEAL

The legal question raised by this appeal is whether or not a denial of a bankrupt's discharge becomes res judicata as to those debts listed in the bankruptcy in which a discharge is denied so that the bankrupt may not discharge those same debts at a later bankruptcy proceeding, or, whether the later discharge should be allowed when the sole ground for denying the discharge in the earlier proceeding was the fact that the bankrupt had received a discharge in a still earlier bankruptcy less than six years before filing the proceeding in which the discharge was denied.

Bankrupt relies specifically upon the case of *In the Matter of Charles S. Masterson, F.d.b.a Prune-Rite Mfg. Co.,* bankrupt, No. 69749 USDC, M.D. California, S.C. 240 Fed Supp. 543 which case was purportedly based upon the case of *Prudential Loan and Finance Co., vs. Robarts,* (C.A. 5) 52 F.2d 918.[2]

[2] It is the position of the Appellees that the argument concerning the dischargeability of the debts here in question should have been determined on appeal of the order of December 24, 1963, or, that the petition upon which said order was based should have been withdrawn.
It is elementary that a determination by a court of competent jurisdiction, not appealed from within the applicable period, is res judicata as to the issues determined. The sole issue in the determination of December 24, 1963 was the dischargeability of the debts listed in the petition filed by bankrupt on October 18, 1963. The dischargeability of the debts was denied and, absent appeal, the determination, after notice and upon hearing, is forever binding as to the issue of dischargeability by way of the theory of res judicata.

It is the position of the (Trustee Appellees in Bankruptcy and the objecting creditor, Valley Credit Service), that the *Masterson* case and the *Robarts* case are so different upon their facts and upon the law under which they were decided as to be repugnant rather than complementary. It is the position of the Appellees that the *Masterson* case, supra, could not have stood upon appeal to this Court because of the difference in facts and law upon which each case was decided. The facts in the *Robarts* case, supra, are that Robarts was adjudged a voluntary bankrupt on a petition filed

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Bankrupt appears to rely upon the *In RE Mayorga* 355 F.2d 89 (1966) decision of the Ninth Circuit Court of Appeals. Citation of this case is of no assistance to his position.

In the *Mayorga* decision, supra, this court pointed out very succintly that, if Mayorga had been requesting an outright discharge or presenting a plan of "composition" (rather than the Wage Earner Plan authorized by Chapter XIII of the Bankruptcy Act 11 U.S.C. §§1001-1086) the discharge of his debts would be subject to the six year interval prescribed by the statute.

The Court states at page 90:

"The quoted section thus prescribes at least a six years interval not only between outright and complete discharges in bankruptcy but also between such discharges and other more complex arrangements authorized by the Act, under which a debtor is able to discharge his debts by only partially paying them, that is, by "composition" of them. Since composition results in creditors losing part of their claims, frequent discharges which accompany composition could be habit-forming in the same way that frequent outright discharges are, and they are subject to the prescribed six year interval.
In the instant case Mayorga did not petition for an outright discharge from his debts by invoking ordinary bankruptcy proceedings. He sought to make use of the "Wage Earners' Plans" proceeding authorized by chapter XIII of the Act, [11 U.S.C. §§ 1001-1086.]

July 11, 1922; receiving a discharge on August 23, 1923. On February 26, 1926, the debt in controversy arose by the giving of a note. On March 1, 1927, Robarts filed a second voluntary petition scheduling said note among his debts, and was adjudged a bankrupt. On April 26, 1927, he gave a new note for the balance due, and on June 2, 1927, judgment was rendered on it in a state court. Robarts did not apply for a discharge, and on September 5, 1928, the record was closed in the bankruptcy court. Under this set of facts Robarts would have been entitled to a discharge under Ninth Circuit decisions *Shepherd v. McDonald* 157 F.2d 467 (9th Cir. 1946).

In the proceeding by Robarts, under the Bankruptcy Act as it then was written, there was no objection to his discharge, no hearing held upon the discharge and no finding of the Court that a ground for denial of discharge was present. The Robarts case was *closed* as the policy under the then law, leaving no facts determined by a Court in a specific proceeding.

The *Robarts* case, 52 F.2d 918, at page 919, indicates:

> "***where there is application and objection and express denial of a discharge, the facts adjudged are easily ascertainable, and are usually such as constitute a perpetual bar. Where there is default in applying, it is conclusively established only that a discharge cannot be had for some sufficient reason."

The rational of the *Robarts* case, then, is that the mere denial of a discharge is not the equivalent of a refusal of discharge on the grounds set forth in the statute.

In 1938 the Chandler Amendatory Act to the Bankruptcy Act was passed. The Chandler Act provides that the discharge of a bankrupt shall be automatic unless an objection to the discharge is filed and, when an objection to a discharge is filed the matter is set down for hearing, a hearing is had and a decision is made by the Court. The discharge proceeding in bankruptcy under the Chandler Act has many of the aspects of a separate and distinct suit. If objection has been made to the discharge, there must be a hearing, which is, in effect, a trial in equity. Considering the discharge proceeding in this context, the Courts have uniformly held that an order denying a discharge upon one of the grounds specified in Section 14 is re judicata as to all provable debts scheduled in that proceeding.

The point is well illustrated in the case of *In re Buchanan,* 62 F. Supp. 964. Buchanan was adjudicated a bankrupt in 1945 upon his voluntary petition. He listed in his schedules some twenty-two creditors with provable claims. The Trustee in Bankruptcy objected to a discharge on the ground that in a former proceeding Buchanan had been denied a discharge because he had concealed assets, made fraudulent transfers and

made a false oath. Nineteen of the creditors scheduled in the second proceeding had been listed in the prior one. The Court affirmed the order of the Referee denying a discharge from the debts scheduled in the first proceeding. It rested its decision upon the proposition "that where a Court has denied a discharge and the proceeding has terminated with an adjudication that a bankrupt is not entitled to be discharged from his debts, this adjudication cannot be circumvented or nullified by a discharge of the same debts in the subsequent proceeding. It is an application of the doctrine of res judicata which prevents the relitigation of issues once decided."

The bankrupt, in the *Buchanan* case, argued that the objections of the Trustee did not come within the scope of the specified grounds for denial prescribed in Section 14 since the concealment of assets and the fraudulent transfers of property did not take place within twelve months preceeding the filing of the second petition in bankruptcy. To this the Court said:

> "This argument misses the point. The issue is not whether the bankrupt has been guilty of concealing or transferring assets. The objections are not based on that ground. They are based on the ground that it has heretofore been formally and finally adjudicated that he is not entitled to be discharged from certain debts. The reason for that former adjudication is not material here."

In *In re Schwartz* 89 F.2d, 172 174, the point of view was expressed as follows:

> "In our opinion the most convincing reason to grant a discharge in the second proceeding as against debts provable in the first would, in effect, permit the bankrupt to evade the limitation contained in Section 14a . . . The inference is inescapable that he has sought by this method to extend the statutory period within which to seek a discharge from the debts scheduled in his first proceeding. This he may not do."

The House Report on the 1938 amendment indicates that the change is not to be read too strongly as a new privilege of the bankrupt. The report points out that the new wording saves the bankrupt from the misfortune of failure to get discharged through neglecting to apply in time. But it notes that the new provision will "hasten the proceeding for discharge and prevent intentional delay by a fraudulent bankrupt until such time as creditors have lost interest in the bankruptcy and are less likely to oppose a discharge." HR Rep. No. 1409, 75th Cong., First Sess., 1937, 27.

In *Perlman vs.* 322 *West Seventy-Second Street Co.,* 127 F.2d 716, 717 (2d Cir. 1942) the Court said:

> "It follows, therefore, that a bankrupt whose estate is closed without his obtaining a discharge is in the same position as one whose discharge was denied.
>
> Analogy to modern rules of procedure also supports this conclusion of res judicata. Under the Federal Rules of Civil Procedure, Rule 41

> (b) . . . applicable to bankruptcies "as nearly as may be" by General Order 37 . . . an involuntary dismissal of an action is with prejudice unless otherwise provided in the order of dismissal. Without deciding how far "with prejudice" goes in a case such as this, we feel safe in saying that the primary object of dismissal with prejudice—preventing harassment of defendants—would be lost if a bankrupt could institute a series of proceedings without loss to himself. Once a person starts a bankruptcy proceeding he, like any other plaintiff, must suffer the consequences of failure to prosecute his cause."

Other cases holding that the 1938 amendment of Section 14a has not weakened the res judicata basis of the rule concerning the effect of a prior discharge are: *Colwell v. Epstein* 142 F.2d 138 (1st Cir. 1944), cert. denied, 323 U.S. 744 65 Sup. Ct. 59, 89 L. Ed. 596 (1944); *In re Schindler,* 73 F. Supp. 741 (E.D.N.Y. 1947).

Under Federal Rule 41 (b) an involuntary dismissal may be without prejudice, if the Court expressly so orders. Where this is done, the *Perlman* case indicates that the dismissal would not be considered a denial of discharge. In that event the bankrupt would not be precluded from obtaining a discharge of the same debts in a subsequent proceeding. It is thus left with the discretion of the Court dismissing the first proceeding to determine when the dismissal is to operate as a bar.

Appellees wish to challenge the statements on page 4 of Appellant's brief that the *Chopnick* case (CA 2) 128 F.2d 521 arose from a situation where a petitioner would fail to request a discharge. The *Chopnick* case, supra, was decided in 1942 and concerned a petition filed in 1940, both of which petitions would have been filed after the amendatory Chandler Act under which the bankrupt was no longer charged with the responsibility for requesting a discharge. The *Chopnick* case, supra, and the *Masterson* case, supra, under which Appellant contends were both decided after the Chandler amendment and, it is inconceivable to Appellees that the *Masterson* case, supra, could have survived appeal to the Ninth Circuit Court of Appeals since it is based upon only 1 case decided 34 years prior and under a substantially different law.

Apparently there is only one United States Supreme Court discussion of this matter and this appears in *Freshman v. Atkins* 269 U.S. 121, at p. 122, 123:

> A proceeding in bankruptcy has for one of its objects the discharge of the bankrupt from his debts. In voluntary proceedings, as both of these were, that is the primary object. Denial of a discharge from the debts provable, or failure to apply for it within the statutory time, bars an application under a second proceeding for discharge from the same debts. *Kuntz v. Young,* 131 Fed. 719; *In re Bacon,* 193 Fed. 34; *In re Fiegenbaum,* 121 Fed. 69; *In re Springer,* 199 Fed. 294; *In re Loughran,* 218 Fed. 619; *In re Cooper,* 236 Fed. 298;

> *In re Warnock,* 239 Fed. 779; *Armstrong v. Norris,* 247 Fed. 253; *In re Schwartz,* 248 Fed. 841; *Horner v. Hamner,* 249 Fed. 134; *Monk v. Horn,* 262 Fed. 121. A proceeding in bankruptcy has the characteristics of a suit, and since the denial of discharge, or failure to apply for it, in a former proceeding is available as a bar, by analogy the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause.

Bankrupt discusses "honest mistake" in filing within the six year prohibition period. This argument misses the point completely. The point here is that the dischargeability of the debts in the question has been litigated and denied. The bankrupt's conduct is not before this court. What is before this Court is a determination by a court of competent jurisdiction upon the merits of discharge as to particular debts and, in accordance with this court's observation in the *Mayorga* case, supra, the six year interval prescribed by the statute is designed to prevent frequent outright discharges from becoming habit forming. Mayorga was allowed to file his Wage Earner Plan within the six year prohibition period because it indicated payment in full of his debts and a discharge would be a mere formality.

CONCLUSION

The decision of Judge Belloni and Referee Folger Johnson, Jr., should be affirmed and discharge denied as to those debts listed in the present petition which were previously listed in the petition filed October 18, 1963, upon the grounds and for the reason that the dischargeability of said debts has been adjudicated by a court of competent jurisdiction and that the reason for the denial of the previous discharge is not before this court.

Respectfully submitted,,

JULIA L. BOSTON
Trustee in Bankruptcy

KENNETH A. HOLMES
Attorney for Valley Credit Service

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of October, 1967.

JULIA L. BOSTON
Trustee in Bankruptcy

22205

NO. 22205

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 1 1968

BATRIS W. PEROVICH, dba B. W. PEROVICH CONSTRUCTION COMPANY,	)
Appellant,	)
vs.	)
PIPE LINING, INC., et al,	)
Appellees	)

APPELLANT'S OPENING BRIEF

FILED

OCT 10 1968

WM. B. LUCK, CLERK

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Los Angeles, California 90013

Attorneys for Appellant Batris W. Perovich, dba B. W. Perovich Construction Company

TOPICAL INDEX

ACT FOR WHICH THE SANCTIONS WERE IMPOSED DID NOT ITSELF WARRANT DISMISSAL. IN ANY EVENT, HOWEVER, IT WAS MANIFESTLY AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO PERMIT THE SANCTIONS TO BE PAID ONLY EIGHTEEN DAYS LATE WHEN PLAINTIFF DID NOT HAVE THE FUNDS AVAILABLE ON THE DUE DATE, AND THERE WAS NO SHOWING WHATEVER THAT THE LATE PAYMENT WOULD IN ANY WAY PREJUDICE THE REMAINING DEFENDANT.

Conclusion

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NO. 22205

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BATRIS W. PEROVICH, dba B. W. PEROVICH CONSTRUCTION COMPANY,	)
Appellant,	)
vs.	)
PIPE LININGS, INC., et al.,	)
Appellees.	)

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

Federal law provides that the United States District Courts shall have original jurisdiction of any civil action or proceeding arising under ny Act of Contress . . . protecting trade and commerce against restraints nd monopolies". (28 U.S.C. §1337). The action below was predicated pon Federal antitrust laws, specifically the Sherman Antitrust Act, 5 U.S.C. §1, et seq., and the Clayton Act, 15 U.S.C. §15 (C.T. page 490, nes 5-8).

This court has jurisdiction over the instant appeal pursuant to 28 U. S. C. § 1291, which provides that "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . " The order dismissing the action below is a "final decision" of the District Court and is therefore appealable. Lyford v. Carter, 274 F. 2d 815 (2nd Cir. 1960); Haldane v. Chagnon, 345 F. 2d 601, 602-603 (9th Cir. 1965); United States v. Shelley, 218 F. 2d 157, 158 (2nd Cir. 1954).

II.

STATEMENT OF ISSUES

1. Did the District Court abuse its discretion in refusing Plaintiffs' new counsel more than 99 days in which to review an enormous record in three separate antitrust actions, including approximately 90,000 exhibits couched in a technical jargon which was unintelligible to Plaintiffs' new counsel; to make any and all motions prerequisite to the preparation of a document, denominated a "trial brief", which required the setting forth in detail of "[t] he facts which each plaintiff expects to prove in support of each claim for relief, [t] he legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim . . . [such contentions including] a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial" [C. T. 3203, line 25, to 3204, line 8], and which could not be

completed until the Plaintiffs were substantially ready for trial; and then to prepare the "trial brief", even though the granting of additional time in which to accomplish the foregoing would not have in any way delayed the trial of the actions?

2. Did the District Court err in dismissing the action below for failure to pay sanctions when the sanctions were imposed upon Plaintiffs for an act, Plaintiffs' discharge of their attorney, which the District Court concluded did not itself warrant dismissal?

3. Did the District Court err in refusing to permit sanctions to be paid 18 days late when Plaintiffs did not have the funds available to pay the sanctions on the due date, and when there was no showing that the late payment would in any way prejudice the remaining Defendant?

4. Did the District Court err in denying Plaintiffs' motions to file in the action below and in action No. 63-321 amended complaints, alleging substantially the same facts as the existing complaints, the purpose of which was to clarify that Plaintiffs, whose existing complaints were predicated upon 15 U.S.C. §1, et. seq., were alleging a claim under 15 U.S.C. §2; to vacate or modify a protective order issued by the District Court which precluded the two persons available to Plaintiffs' counsel with the ability to assist them in interpreting 90,000 documents couched in a technical jargon largely unintelligible to Plaintiffs' counsel, which would have to be reviewed in connection with the preparation of the "trial brief", from access to those documents; and to reconsider and/or clarify certain

discovery rulings which the Defendants construed as precluding Plaintiffs from inquiring into a general conspiracy in the pipe industry without first showing that the general conspiracy included the aspect of the industry in which Plaintiffs were engaged, when the District Court acknowledged that the granting of these motions would require giving Plaintiffs additional time to file the trial brief?

III

STATEMENT OF THE CASE

This appeal is from the dismissal of the action below - - after it had been pending for more than four years, a record of over 4,000 pages (excluding depositions and exhibits) had been amassed, extensive discovery had taken place, and the case was approaching trial - - for lack of diligent prosecution; and - - although the Appellant did not have the funds available to pay them on their due date, and when funds became available offered to pay them 18 days late - - for failure of Appellant to pay sanctions of $328.08 to Appellee's counsel. [C. T. page 3877, lines 1-10; page 3934, lines 3-15; pages 3957-3974].

The action from which the within appeal is taken, Perovich v. Pipe Linings, Inc., et al., No. 63-278, was one of three related antitrust actions commenced in the United States District Court for the Southern (now Central) District of California, in March of 1963.[1] [C. T. 2]. The

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[1] The others were Northwest Pipe Linings, Inc. v. Pipe Linings, Inc., et al., and Inplace Linings v. Pipe Linings, Inc., et al., United States District Court for the Southern (now Central) District of California, Nos. 63-279 and 63-321, respectively. These cases are not presently before this (Cont.)

respective Plaintiffs were Batris W. Perovich ("Perovich") the Appellant herein, a corporation of which Perovich was president, Northwest Pipe Linings, Inc. [R. T. 1/17/67, page 129, lines 5-7], and a third corporation, Inplace Linings, Inc., of which one Charles Davin ("Davin") was president. [C. T. 2860]. Since they all dealt with the inplace lining of steel and concrete pipe, the three cases were consolidated for pretrial and discovery purposes [C. T. 1429], and are referred to herein collectively as the "Perovich actions".

The gravamen of the Perovich actions was a conspiracy to fix prices and allocate markets among various manufacturers of steel and concrete pipe, including the Appellee herein, United Concrete Pipe Corporation ("United"). [C. T. 2-13]. In No. 63-278, Perovich alleged that since December, 1958, he ". . . has been engaged in the State of California in the business of the inplace rehabilitation of pipe by means of the application of cementious material by a process commonly known as the 'Tate Process', and by the application of cementious material by centrifugal force, in direct competition with [certain of] the Defendant[s]. . . " including United [C. T. page 491, line 31, to page 492, line 5]; that these Defendants ". . . entered into an unlawful conspiracy to apportion and divide all of the business of the inplace rehabilitation of steel and cast iron pipe inplace in the State of California . . . . [as a result] the Defendants have monopolized within the State of California the business of the inplace rehabilitation of pipe inplace, to the exclusion of all other persons, including

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Cont.) Court. The latter was settled during the pretrial period [C. T. 3873; C. T. 3890; C. T. 3939], and while the former was dismissed [C. T. 3957] with the action below, no appeal from its dismissal is being prosecuted. The procedural histories of the three actions are inextricably interwoven, and it is essential to an accurate and undistorted presentation of what occurred in the District Court that there be no arbitrary amputation of the action below from the other actions for purposes of analysis.

the Plaintiff . . . [C. T. page 492, lines 8-30], that the Defendants, including United, " . . . have conspired to bid and contract to take each and every job or contract for the inplace rehabilitation of pipe, on all jobs and contracts involving the inplace rehabilitation of cast iron and steel inplace where the Plaintiff was a bidder, below their actual cost, in order to deprive the Plaintiff of the opportunity of performing said job or contracts" [C. T. page 493, lines 1-7]; that these Defendants " . . . have agreed to apportion the taking of the aforesaid contracts below cost inter se in order that no one of . . . [them] would be required to bear more than its proportionate share of the losses incurred . . . " [C. T. page 493, lines 7-14]; that these Defendants " . . . attempted to eliminate all other parties, including the Plaintiff, from the business of the inplace rehabilitation of steel and cast iron pipe" [C. T. page 493, lines 20-24]; and, that as a result of the unlawful acts of the Defendants, including United, Plaintiff " . . . sustained damage to his business and property and loss of business and business profits, in the sum of $200,000.00" [C. T. page 494, lines 24-29][2]. In addition, the complaint contained a count charging the Defendants with violating the antitrust laws through a conspiracy which embraced " . . . the manufacture and sale of all grades and types of concrete pipe . . . ", including the inplace rehabilitation of pipe, through allocating among themselves the pipe business in the western states. [C. T. page 495, line 3, to page 500, line 32]. The other actions were substantially the same [C. T. page 905, lines 4-6], but dealt with different geographical areas -- Washington and Oregon for No. 63-279, and Oklahoma, New Mexico and Texas for No. 63-321. [Deposition of Batris W. Perovich, 4/19/63, page 104, lines 13-15; Deposition of Charles O. Davin, 5/8/63; page 40, line 1 to page 41, line 22; C. T. page 3673, lines 15-21.]

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[2] At his deposition, Perovich alleged that his company did not receive a job after 1961 and that he was ultimately forced to sell off the major part of his equipment. [Deposition of Batris W. Perovich, 4/19/63, page 13, line 10 to page 17, line 14]. Hence the damage which Perovich allegedly

claim was redressable because Perovich had previously executed a general release in their favor which allegedly barred this action. [C. T. page 978, line 4, to page 979, line 25; page 942, line 26, to page 944, line 15; page 948, line 24, to page 950, line 32; page 968, line 32, to page 971, line 8].

Approximately one year after the Perovich actions were filed, on March 10, 1964, a federal grand jury returned indictments against a number of pipe manufacturers, including United and its officers and directors, charging them with a conspiracy (to which they ultimately pleaded nolo contendre) to violate the antitrust laws by price fixing and market allocation. [C. T. page 3960, lines 4-12, lines 27-32]. Perovich was credited with "blowing the whistle" on the conspiracy. [C. T. 3960, lines 9-12].

In December of 1964, this Court ordered all of the "western pipe cases" pending in the District Courts of the Ninth Circuit transferred to the District Court in which the Perovich actions were pending [C. T. 3960, lines 13-19], and they were ultimately assigned to District Judge Martin Pence.

The attorneys for the Plaintiffs in the Perovich actions prior to July of 1964 was the firm of Meserve, Mumper & Hughes, by Richards D. Barger, Esq.[3] In July of 1964 they were discharged, and John Joseph Hall, Esq., was substituted in their place. [C. T. 1426-1427; R. T. 1/17/67, page 19, lines 3-10; page 29, lines 10-13; page 35, lines 4-20].

Mr. Hall, a patent lawyer, was a sole practitioner with little antitrust experience. [R. T. 1/17/67, page 68, lines 18-24; page 76, lines 14-18; page 115, line 20, to page 116, line 12]. Yet, despite his limited experience and the fact that he had arrayed against him the combined manpower, experience and ability of the law firms of Gibson, Dunn & Crutcher, Hill, Farrer &

[3] The evidence in the record as to why they were discharged indicates that Mr. Perovich felt they were too lenient about giving extensions to the Defendants. [R. T. 1/17/67, page 105, lines 3-8].

Burrill, Sheppard, Mullin, Richter & Hampton, and Richards, Watson & Hemmerling, Mr. Hall's constribution to preparing the cases for trial, including extensive discovery, is apparent from the record.

By late in 1966 pretrial proceedings were in an advanced stage, and the problem of scheduling the final phase of the Perovich actions--consisting principally of the Plaintiffs' trial brief, Defendants' motions for summary judgment to test Plaintiffs' cases as set forth in the trial brief, and the trial itself--arose. Such scheduling was discussed on October 3, 1966 [R.T. 10/3/66, page 25, line 13, to page 26, line 16]; and on October 17, 1966, the District Court entered Pretrial Order No. 4, prepared by counsel for United, which scheduled the trial brief for December 15, 1966 [C.T. 3203, line 25, to 3204, line 8]; the Defendants' motions for summary judgment for December 22, 1966 [C.T. 3204, lines 9-11]; the Plaintiffs' memoranda in opposition to Defendants' motions for summary judgment for December 28, 1966 [C.T. page 3204, lines 12-14]; and the trial itself for February 13, 1967. [C.T. page 3209, lines 2-4]. Mr. Hall specifically objected to the December 14, 1966 deadline.[4] [C.T. page 3209, lines 10-12].

While denominated a "trial brief", the document in question was, in effect, a detailed blueprint delineating Plaintiffs' conduct of the trial, consisting of:

> "a. The facts which each plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;
>
> "b. The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions

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[4] Pretrial Order No. 4 also required Plaintiffs to complete their remaining deposition discovery "during the period November 7th through December 1, 1966", so that Mr. Hall would be taking depositions at the same time he was working on the trial brief. [C.T. 3202, lines 29-31].

as to its theory and measure of damages pertaining to each claim and the party bearing the burden of proof on each issue. Plaintiff's contentions as to the measure of damages should include a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial." [C.T. 3203, line 28, to page 3204, line 8].

To quote Judge Pence, ". . . there must be in the trial brief subjunctively [sic] and fundamentally the basic foundation of the plaintiffs' case . . ." [R.T. 12/13/66, page 58, lines 21-23]; its filing would, in effect, mean that the Plaintiffs were ready for trial.

Judge Pence recognized that it might not be possible for Mr. Hall to complete the trial brief by the date specified in the order. As stated by Mr. Hall:

". . . there was a discussion in court [on December 13, 1966] about the time for filing the trial brief pursuant to Pretrial Order No. 4 . . . Judge Pence . . . asked me whether I could get the trial brief finished by December 15 as specified in Pretrial Order No. 4 . . . I . . . told Judge Pence I could use additional time, and . . . in open court I . . . said that I could get it in by the 21st . . . after the formal hearings were over in San Francisco . . . there was a discussion in Judge Pence's chambers where Judge Pence was present and defense counsel were present as well as myself . . .

"At that time as part of our discussion, which was off the record, Judge Pence told me that in effect I should take more time to prepare the trial brief. That in view of my situation, it wouldn't be possible to get the trial brief done in time, even on the 21st of December [1966].

"A further discussion then took place in chambers at this time which was to the effect that I should get together with defense counsel to work out a time period for the preparation and filing

of the trial brief in these cases, and that if we couldn't reach agreement, that Judge Pence would resolve the matter at the next scheduled hearing which was on December 30, 1966."

[R. T. 1/17/67, page 71, line 1, to page 72, line 1; emphasis added].

By mid-December of 1966 Mr. Hall, who had been working on the Perovich actions on a substantially full time seven-day week basis since August of 1966 [R. T. 1/17/67, page 73, lines 5-14][5], was admittedly exhausted from his labors. [R. T. 1/17/67, page 76, lines 1-6]. Yet still looming ahead of him was some remaining pretrial proceedings - - including particularly the trial brief - - and ultimately the trials themselves. On December 14, 1966, the day before the trial brief was ostensibly due, Mr. Hall met with Mr. Perovich and informed Mr. Perovich that he could not complete the trial brief by December 15th, or even by December 21st. [R. T. 1/17/67, line 18, to page 72, line 18].

Mr. Perovich was opposed to any delays whatever in the filing of the trial brief:

"Mr. Perovich told me (Hall) that he wanted me to complete and file the trial brief by December 21, because he did not want the trial date of February 14 to be changed. He wanted to hold fast to that date.

* * *

". . . he felt that any delay would be to his disadvantage in the case

* * *

"He told me that any delay in the trial brief would cause an additional delay of the trial date, which he did not want at all cost." [R. T. 1/17/67, page 72, line 8 to page 74, line 5].

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[5] Judge Pence complimented Mr. Hall as "a hard working man" [R. T. 12/13/66, page 58, line 15], and "felt he (Hall) was pacing himself too hard and I told him not to kill himself." [R. T. 3/18/67, page 17, lines 1-3].

At the end of the conversation, Mr. Perovich informed Mr. Hall that:

"He was going to get another attorney, and that he didn't want me [Hall] any more in the case, and good-by. With that he walked out the door." [R.T. 1/17/67, page 73, lines 22-24].

The discharge (no substitution was yet filed) pertained to only two of the Perovich actions; the instant case and Northwest Pipe Linings, Inc., et al, No. 63-279. Mr. Hall, however, immediately attempted to telephone Charles Davin, president of the third corporate plaintiff, Inplace Linings, Inc., in Texas, and reached him several days later. He advised Mr. Davin that because of Mr. Perovich's actions, he was withdrawing as counsel for Inplace Linings, Inc.; and that, in any event, because of his exhaustion, it would probably be advantageous for Inplace Linings, Inc. to secure other counsel to try the case:

"A I called Mr. Davin in the evening of December 14, but he was not at home, in Texas. I kept trying to get a hold of him later by long-distance telephone, but I did not get a hold of him until a day or two later.

" I told him what had happened and my discussion with Mr. Perovich, that Mr. Perovich had discharged me. I further told Mr. Davin that under the circumstances I felt that it was best for him to get other counsel. That since the cases were somewhat inter-related, it would be better to have the same counsel on all of these cases.

"I further told him that I thought it would be better for him from a trial standpoint also, because I had just about worn myself out in preparing these cases, and that the schedule that was set up in the next two or three months for trial was a very difficult one for me to meet; especially

"Q Did you tell him in substance or effect that the business of preparing the brief had exhausted you?

A I told him that because of my condition, due to the heavy deposition schedules and hearings that I had just been going through, that I could not meet the schedule for filing the trial brief proposed by Pretrial Order No. 4, or even on the 21st of December." [R.T. 1/17/67, page 75, line 15, to page 76, line 13].

Perovich soon had a change of heart regarding his action in discharging Hall and, two days later, asked Mr. Hall to finish the brief. Mr. Hall refused:

"A Our disagreement happened on a Wednesday. On Friday, I came back to his office. Friday morning I came back to his office and asked him if he would stay on the case.

* * *

"THE COURT: What was his response?

A He said he just could not do it, that he committed himself on some other cases, or something to that effect, and that he could not do it." [R.T. 1/17/67, page 151, line 25, to page 152, line 16].

Upon discharging Hall, Perovich immediately set about to secure other counsel. His efforts were not fruitful. He contacted a number of antitrust lawyers in several states [R.T. 1/17/67, page 129, line 16, to page 132, line 25], but none was willing to take the cases:

"Q [BY MR. WEINSTEIN] And between the 14th of December and January 10, 1967, did you [Perovich] make an effort to contact other lawyers with a view toward employing them to carry your two cases forward?

A Yes.

Q Would you name each attorney that you contacted?

A I contacted Maxwell Blecher. I called him in San Francisco, and they had informed me that he was in Hawaii. I got his phone number, and I called him there. I also talked at some length with Mr. Ferguson and Mr. Burdell. As I had related to the court here that Friday, I was on my way to San Francisco to meet them in San Francisco to discuss the case.

Q When were you to meet them in San Francisco?

A On Wednesday.

* * *

"THE COURT: January 4, that would be.

THE WITNESS: Yes. Thank you, your honor. It is January 4.

BY MR. WEINSTEIN:

Q What other attorneys did you contact?

A I contacted a man--I tried to get his office--it was a man named Matthew--I don't recall his last name.

THE COURT: Would it be Maxwell Keith?

THE WITNESS: No. Matthew --

BY MR. WEINSTEIN:

Q Mitchell?

A Yes. He is with a new firm in San Francisco. I tried getting in touch with him, but he was out until the 16th.

I then called the firm--a man by the name of Maxwell Keith. He was going to be out until Tuesday.

Q When did you call him?

A I tried to call him on Friday, the 6th, January 6th,

I then called Max Keith's office back, I believe, it was in the late afternoon, and talked to him about the case. He had recommended a firm, because it was in San Francisco, down here called--I have them all written down somewhere, but his name was Stanley Brown. This was also on Friday of that same day, January 6. He said he wanted to look at the files at the court house, which was here, and would contact me back on Monday. He contacted me on Monday, and he said he just couldn't take it. It was too big of a case.

I called two others, and I just can't recall their names. They are here in Los Angeles.

Q How many different attorneys did you reach in an effort to ask them to take your case?

In other words, I want you to exclude those that you never actually made contact with, because they didn't answer their phone or return your call.

A Five or six.

Q Did all of them tell you that they would be unable to take the case?

A Yes.

Q Mr. Blecher tell you he was too busy?

A He was too busy.

Q What did Ferguson and Bardell tell you?

A They were working on a large case that they had hoped would settle. It was a turbine case, or something, and it was awkward from Seattle and Los Angeles, and they had recommended me to try and get a firm here in Los Angeles that would be close, because a time element was also very tight.

A Matthew Mitchell I couldn't reach. He wouldn't be back in the office until the 16th.

Q How about Maxwell Keith?

A Yes. I called him, as I mentioned, Friday morning. He was out. I left a call for him to return the call, and I got in touch with him, I believe, in the afternoon. Also I remember another person was Pugh.

Q Keith Pugh?

A Yes. I get mixed up with those, but I got in contact with him. I believe he was out until the following Tuesday.

Q All of these people that you did communicate with told you for one reason or another that they could not take your case?

A Yes."

[R.T. 1/17/67, page 129, line 16, to page 132, line 25].

When he perceived the difficulty which he would encounter in securing other counsel, Perovich once again appealed to Hall to complete the trial brief, but Hall refused:

"BY MR. MILLER:

Q . . . after the date you discharged Mr. Hall, and before January 13, at any time did you discuss with Mr. Hall the possibility of his going ahead and working on the plaintiff's trial brief?

A Well, after I came back from San Francisco, I asked Mr. Hall if he would help me in getting--helping us getting the trial brief out.

Q And what did he say?

commitments, and he just couldn't do it."

[R.T. 1/17/67, page 151, line 5, to page 151, line 14].

On December 30, a Pretrial Conference was held before Judge Pence, at which Perovich, who had not yet secured other counsel, was present.[6] Perovich informed the court of what had transpired with respect to Mr. Hall and his efforts to secure other counsel. He stated that he had contacted a Spokane, Washington law firm, Ferguson and Burdell, that he felt would be substituted in as counsel in the Perovich actions. He indicated, however, that Ferguson and Burdell had not yet agreed to take the cases:

"MR. PEROVICH: . . . I have gotten in touch with Mr. Ferguson and Mr. Burdell in Seattle, and during the holidays we were kind of held up getting everything completed.

But I believe they will be the trial attorneys on my cases.

THE COURT: You don't make that as a positive statement, I take it?

MR. PEROVICH: We still have another meeting with them next week, the first part of next week, right after the New Year's."

[R.T. 12/30/66, page 7, lines 13-23].

Although Perovich had not retained counsel, Judge Pence, in Pretrial Order No. 5, rescheduled the date for filing the trial brief to January 13, 1967. Thus, whatever new counsel Perovich secured would have approximately two weeks (less the time that would elapse between December 30 and the date on which he was retained), in which to, in effect,

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[6] As testified by John Joseph Hall, Esq., Judge Pence had planned prior to Perovich's discharge of his counsel to hold a hearing on December 30, if Hall and defense counsel were unable to agree on a new deadline for the filing of the trial brief, in order to schedule such a deadline.

become prepared to try three complex antitrust cases.

The Pretrial Order warned that:

"In the event the brief is not so prepared and filed [by January 13, 1967], and good cause is not shown, the Court will entertain a motion for dismissal of the above entitled cases."[7]

As it turned out, Ferguson and Burdell refused to take the case. Ultimately, a Texas lawyer to whom Perovich and Davin had ultimately resorted in their search for counsel, Anthony Atwell, Esq., referred Perovich and Davin to Les J. Weinstein, Esq., of McKenna & Fitting:

"MR. WEINSTEIN: . . . on the afternoon of January 9, 1967, I received a telephone call from an attorney by the name of Anthony Atwell from the law firm of Atwell, Grayson & Atwell, in Dallas, Texas. Mr. Atwell knew of the firm of McKenna & Fitting and me by reason of the fact that his law partner was associated in another antitrust case with us not long before this.

"The first thing he asked me was whether or not our office had any conflict of interest that would prevent us from taking any of the Pipe cases, and I told him that we did not. He stated to me, 'Well, between the firms representing steel companies and pipe companies and those with connections,

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During the course of the hearing on December 30, Judge Pence stated: "As I say, this reminds me of the situation I had recently in Honolulu in which a corporation in an antitrust case seemed to have some problem in getting counsel and having counsel present when the matters were especially called, so I exercised the prerogative to dismiss for the lack of prosecution.

"I don't say I am going to do that in these cases. I simply said I have done it, and recently."
[C.T. 12/30/66, page 10, lines 2-9].

you are probably the only office in Los Angeles that doesn't have that type of conflict.'

" He said he had two people that are very much in need of an attorney. They no longer have an attorney. The cases are pending in Los Angeles, and they have asked if our firm would handle them since we are handling one of the Texas Pipe cases. He said it is obviously impossible for us to do so, and I am wondering if you would give consideration to handling the cases. I said we would at least look at it.

" He said, 'Well, would you do me a favor? If you can't handle them, would you help them find another attorney', and I expressed to him my feeling that if we could not, we would assist them, Mr. Davin, to find another attorney, because he had indicated to me that Mr. Davin had had some difficulty in finding an attorney."

[R.T. 1/17/67, page 121, line 3, to page 122, line 5].

Mr. Weinstein first met with Perovich and Davin on January 10, pproximately 4:00 o'clock P.M. [R.T. 1/17/67, page 122, lines 11-17]. of that date, the deadline for filing the trial brief was only three days away.

A week later, on January 17, a hearing was held before Judge ence. At this time no formal order substituting out Mr. Hall as counsel r the Plaintiffs had been entered. Nevertheless, Mr. Hall was not present the hearing, and Judge Pence treated the Plaintiffs--including the two rporations--as though they were appearing <u>in propria persona.</u> [R.T.1/17/67, ge 4, line 3, to page 5, line 18; page 67, lines 3-8].

Mr. Weinstein was present at the hearing. He explained to e Court the circumstances under which he had been approached to assume e burden of representing the Plaintiffs in the Perovich actions. He stated

whether the court would grant him sufficient time to complete the trial brief. R. T. 1/17/67, page 6, line 22, to page 7, line 1; page 7, lines 5-15; age 11, line 24, to page 12, line 3].

Judge Pence responded by indicating that he was seriously hinking about dismissing the Perovich actions for failure of the Plaintiffs o meet the January 13 deadline, and the Defendants accordingly moved for ismissal. [R. T. 1/17/67, page 12, line 4, to page 18, line 12].

A day-long hearing ensued, at which Mr. Weinstein, who had irst heard of the cases only a week earlier and was still not counsel of ecord, undertook to demonstrate to the Court why the cases should not be ismissed. Both John Joseph Hall, Esq., Les J. Weinstein, Esq., and Batris W. Perovich testified at length. The circumstances of Perovich's ischarge of Hall and of his efforts to secure new counsel were revealed in etail. [R. T. 1/17/67, page 67, line 3, to page 172, line 13].

At the conclusion of the hearing, Judge Pence made the ollowing statement:

"This morning when I came here I was--and from the affidavits, it was uncertain as to whether or not this [the discharge of Plaintiffs' attorney] was a ploy on the part of the plaintiffs to get more time. The evidence has convinced me that it was not such a ploy. It convinced me that Mr. Perovich is probably a much better pipeline man than he is a lawyer. I hope so, because the action he took was--to characterize it--it was done in haste, and done in anger. It was nearly disastrous. I say nearly disastrous, because the actions taken by Mr. Perovich, according to the testimony, and I am satisfied they were, indicate that he all of a sudden realized the problems that he

and with all of the means at his disposal to obtain new counsel. It was only finally that he was successful.

I am satisfied that he [Perovich] did try to get Mr. Hall to come back at a time when, if Mr. Hall had come, it would have meant only a slight delay. I cannot blame Mr. Hall for refusing. Once you have been dismissed as that, all of the fight and all of the interest in the case goes out, as I am sure it did with Mr. Hall, even though the two still remain frieds. I am satisfied from the evidence that the plaintiff Perovich and through him Davin did not take this action of dismissal in any way to order [sic] the disposition of the case, but rather from what amounted to a sudden hasty decision based upon irritation, not upon reason. Too much time has been invested by the plaintiff, too much time and money has been invested by the plaintiff, and too much time has been invested by the court under the circumstances as they now appear for the court to merit the court to dismiss the case."

[R.T. 1/17/67, page 173, line 1, to page 174, line 6; emphasis added].

Nonetheless, despite its conclusion that Perovich's discharge of Hall was not "a ploy . . . to get more time", Judge Pence thereafter stated that he would in the future impose sanctions upon the Plaintiffs[8] for the "enormous amount of time, trouble and effort"

[8] No effort to distinguish between or among the three Plaintiffs was made, even though Inplace Linings, Inc. had done nothing whatever to delay proceedings.

The amount of the sanctions was not set at the time. Judge Pence ordered the parties to attempt to agree upon a figure. In the event that they were unable to do so:

". . . at a subsequent hearing I will determine how much the plaintiff will pay to the defendants for the trouble which he has caused the defendants' counsel, the time spent, the effort spent by defendants' counsel as a result of the hasty actions of the plaintiffs."

[R. T. 1/17/67, page 174, lines 20-24].

The next issue to be considered was the new filing date for the trial brief. The prior filing dates had been tied to a trial date of February 13, 1967. That date, Judge Pence recognized, was lost.

"I cannot and will not at this time schedule a trial date. Now, that will come later on this Spring. The reason being that all of a sudden I have commitments all based upon the fact that this case would be completely out of the way certainly not later than March. Now that date is gone. It is impossible. We will have to reschedule after the trial brief is prepared, after the motions are prepared, and argued and heard, and a decision is made. Some time about that time we will then decide when we will go to

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The "enormous amount of time, trouble and effort" to which Judge Pence referred in these antitrust cases, which had been pending for nearly four years and in which a record of thousands of pages had been amassed, consisted, in large measure, of defendants' counsel's preparation for--including conferences among themselves--and attendance at two pretrial hearings: that on December 30, 1966, in which Judge Pence gave the Plaintiffs two weeks in which to retain new counsel and have the new counsel file a trial brief that was tantamount to being prepared for trial; and that on January 17, 1967, at which they moved to dismiss the cases. [C. T. 3606-3627].

I don't know."

[R. T. 1/17/67, page 175, line 16, to page 176, line 2; emphasis added].

The hearing was continued to the following day. Judge Pence indicated that he was assuming that Mr. Hall, "who apparently is well versed in the case--he should be, it has been giving him nightmares for months--and seven days a week of them", would assist Mr. Weinstein in the preparation of the trial brief. [R. T. 1/17/67, page 175, lines 7-12].

The parties accordingly appeared before Judge Pence on January 18, 1967. At that time, Mr. Weinstein informed the Court that Mr. Hall would not give him any assistance at all beyond answering brief inquiries as to the location of certain documents:

"MR. WEINSTEIN: Your Honor, after the close of yesterday's hearing I did two things: I contacted Mr. Hall to make certain that he and I understood what he meant by 'rendering cooperation'. He informed me that he had in his mind the same kind of cooperation that Mr. Barger [the attorney whom Hall succeeded] had given him when he no longer was attorney in the case, namely, that he would meet with me if necessary to explain briefly what the files were, point out which folders had what in them, and would be prepared to answer any short questions I had on the telephone, whereby he might answer in a few seconds what might take me hours to find.

I said I wanted to know very specifically whether or not he was prepared, for compensation or otherwise, to participate to the extent of actually assisting me in

gathering the data and the information in order to write a brief.

He said, No, that was not what he intended.

I told him I was specifically asking him because I envisioned this problem would come up.

* * *

"Frankly, he wants nothing to do with the case, but he feels an obligation to Mr. Perovich, he will not refuse my telephone calls, if I ask which file the complaint is in and which depositions are important, he will tell me those matters."

[R.T. 1/18/67, page 4, line 7, to page 5, line 1; page 9, lines 10-14].

Mr. Weinstein also informed the Court that a prior estimate that he would require from 60 to 90 days to complete the trial brief had been based upon less than full appreciation of the extent and nature of the project:

"I read last night pretrial order No. 4, which I never had occasion to read before, and learned something I did not know, even when I made my 60-to-90 days estimate, and that is that preparing a trial brief in this proceeding is an important and difficult task; if you make a mistake in it it may well be fatal in the case. The day you start to draft the trial brief, in my opinion after reading pretrial order No. 4, you must then almost be in a position to try the case, you must be ready to point out specifics, to know which witness would testify to which fact, you have to have all your law, be prepared to report on what facts will be brought out at the trial and to delineate the issues--really, to prepare for trial--with some

other intermediate steps to take place between them.

" I considered the matter and I told counsel this morning that I thought a bare minimum was 90 days, that although I do not wish to be bartering or blackmailing, I did not think it could be done in less, . . . I did not think that was possible.

* * *

"My proposal boils down to approximately a foot a week, when we talk in terms of 90 days, and 10 feet [the height to which he claimed that the portion of the record in his possession stacked]. I don't think I am being unreasonable. I use it as a shorthand expression, but merely to call to the Court's attention the truly enormous task that is before me." [R.T. 1/18/67, page 5, line 2, to page 6, line 25].

Judge Pence told Mr. Weinstein that he would give him until April 1, at 4:30 o'clock P.M. in which to file the trial brief:

". . .If you want to undertake it in that length of time, it's yours. If you say you can't do it in that period it is not yours." [R.T. 1/18/67, page 9, lines 21-24].[10]

Ultimately, the deadline was extended until April 4, at noon, and Mr. Weinstein accepted. The court's order was incorporated into Pretrial Order No. 6. [R.T. 1/18/67 page 11, lines 5-7].

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[10] Judge Pence did not specify what would happen if Mr. Weinstein refused, but in view of the fact that Mr. Weinstein was the only attorney that Perovich and Davin had been able to find willing to take the cases in nearly a month of searching in California, Texas and Washington, the possibility of a dismissal by default was evident, if not preordained.

Thereafter, pursuant to the oral order of Judge Pence imposing sanctions, counsel for the various defendants submitted unsworn statements of their expenses. [C. T. 3602; 3606; 3623]. That from United's counsel consisted of a letter to Les J. Weinstein, Esq., describing the work done for which they were seeking compensation and concluding with a total charge for professional services rendered of $972.10. (It also sought compensation for disbursements of $11..82, plus an unspecified amount for part of the cost of a reporter's transcript of the "December [sic January, 1967] 17 and 18, 1966 hearing.") [C. T. 3616 to 3619].

Plaintiffs objected to the order imposing sanctions which the Defendants prepared on the grounds, inter alia, that the sanctions sought by the Defendants included charges for time spent after January 17, 1967, the date on which the Court ordered the imposition of sanctions, and time spent by various counsel for the Defendants in conferring with each other about the award of sanctions; that there was no effort to apportion the sanctions as between the various actions, even though Inplace Linings, Inc. had done nothing whatever which resulted in failure to comply with any court order; and that "[n]o evidence has been introduced and no affidavit has been filed with the court by any of the attorneys for the defendants substantiating any of the alleged charges allegedly incurred. . ." [C. T. page 3628 to page 3631].

Despite Plaintiffs' opposition, an Order Imposing Sanctions was entered awarding the Defendants, and each of them, the full amount that they claimed. [C. T. 3745]. It provided that "Plaintiffs, severally or jointly, shall compensate defendants, through their attorneys, a total of $4,945.25. . ." [C. T. 3746, lines 30-31; emphasis added].[11]

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[11] Thus if the sanctions were not paid, Inplace Linings, Inc., whose counsel had withdrawn through no fault of its own, would suffer the same penalty as the "guilty" Plaintiffs.

While the sanctions point was being fought, Plaintiffs were busy on another front. On March 14 and 17, respectively, Plaintiffs filed documents aggregating in excess of 100 pages in which they moved:

1. To extend the time for filing the trial brief;

2. To file amended complaints in Nos. 63-278 and 63-321.

15 U.S.C. §1 of the Sherman Act concerns contracts, combinations and conspiracies in restraint of trade, while §2 concerns monopolization, attempt to monopolize, and conspiracy to monopolize. The First Amended Complaints were predicated on 15 U.S.C. §1, et. seq., and the proposed Second Amended Complaints did not seek to alter the basic facts upon which Plaintiffs' claims were predicated but only, according to Plaintiffs' moving papers, to "more clearly set up the Plaintiffs' claim under §2 of the Sherman Act. . ." [C.T. page 3721, lines 16-17], particularly attempted monopolization.[12]

3. To vacate or modify a protective order issued by Judge Pence which precluded either Perovich or Davin from access to approximately 90,000 documents, many of them in technical pipe industry jargon, which had been produced by the various Defendants.

4. To reconsider and/or clarify certain discovery rulings so as to require Defendants to respond to a group of interrogatories that Plaintiffs had theretofore propounded and which were "directed at antitrust violations in the sale and manufacture of concrete pipe.

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[12]The Second Amended Complaint also contained certain other changes from the FirstAmended Complaint, but at oral argument Plaintiffs' counsel made it clear that he was principally concerned with attempted monopolization and was willing to forego all other material changes. [R.T. 4/6/67, page 66, line 23, to page 70, line 1]. As Mr. Weinstein stated: "I just want to be able to present a unilateral attempt to drive my client out of business, and driven out they were." [R.T. 4/6/67, page 60, lines 19-21].

"without requiring plaintiffs to first establish a direct link between said conspiracy [in the sale and manufacture of concrete pipe] and the business of inplace lining and rehabilitation of steel pipe." [C. T. 3739, line 32, to page 3740, line 4].

Affidavits in these documents allege, inter alia, the following:

(1) That since January 10 Plaintiffs' counsel had devoted a substantial amount of time, including many evenings and weekends, to work on the Perovich cases. [C. T. 3644, lines 19-30; page 3649, lines 13-29].

(2) That "counsel for the plaintiffs must become familiar with and understand prior to being able to properly write a trial brief" certain documents produced by Defendants and located in a repository at the offices of Gibson, Dunn & Crutcher - - the total number of documents in the depository was estimated at 90,000 - - and that Plaintiffs' counsel were unable to properly understand the documents because they were couched in "trade terminology, abbreviations and other terms of art" unintelligible to the plaintiffs' attorneys. [C. T. page 3645, lines 14-15; page 3700, line 26, to page 3701, line 15; page 3714, lines 15-26; page 3718, line 11, to page 3719, line 6; page 3711, line 21 to page 3712, line 14].

(3) That the files in the possession of Plaintiffs' then counsel were incomplete and, indeed, that even the three Amended

Complaints which were filed in the respective cases were not in their possession. [C.T. page 3645, line 26, to page 3646, line 11].

The substance of Plaintiffs' position was that the granting of these motions was necessary in order to permit Plaintiffs to prepare an adequate trial brief and then prosecute the actions to completion. [C.T. page 3637, line 19, to page 3640, line 1].

A hearing on the motion to extend the time to file the trial brief, but not on the other motions, was held on March 18, 1967. At that time, Mr. Weinstein explained that his acceptance of the April 4 date was based upon an erroneous estimate of the time that would be required, motivated by a desire to help his clients:

> "I made some promises, but frankly I should have known I couldn't have kept them, and frankly was motivated to take the cases because of Mr. Perovich who couldn't find another counsel.
>
> * * *
>
> "I made some optimistic estimates. At that time I tried to make a quick determination as to what preliminary matters might be involved, but I made a very bad guess, and I acceded to your Honor's suggestion that I could not have beyond April 4th." [R.T. 3/18/67, page 17, line 25, to page 18, line 11].

Mr. Weinstein pointed out that once he actually began delving into the case he discovered that his files were incomplete and would have to be

reconstructed and that the 90,000 documents which had been produced by the various Defendants and which would have to be reviewed in connection with the preparation of the trial brief were written in a highly technical terminology which, although he held an engineering degree and was licensed to practice before the Patent Office, rendered them unintelligible to him. [R.T. 3/18/67, page 18, line 15, to page 21, line 23; C.T. page 3644, line 19 to page 3646, line 11]. Yet under the protective order issued by the Court, he believed he was precluded from even discussing the documents with his clients, Davin or Perovich, the only two persons available to him who would be in a position to assist him in interpreting them. [C.T. 3752, lines 24-32].[13]

Judge Pence acknowledged that if the Plaintiffs' motions for leave to file amended complaints, modification of the protective order barring Perovich and Davin from the documents which the Defendants had produced, and additional discovery, were granted, it would require

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13 While Judge Pence disagreed with Mr. Weinstein's interpretation of the relevant portion of the order [R.T. 3/18/67, page 70, lines 2-25], this is what the Court's Order said:

"6. Under no circumstances shall Batris W. Perovich, Charles O. Davin or any other employee or officer of any plaintiff be permitted access to the depository or to any of the defendants' protected documents, or microfilms or copies thereof maintained in the depository without an express order of this Court authorizing such inspection. Furthermore, neither plaintiffs' counsel nor any authorized representative who procures copies of selected documents in the depository shall suffer or permit disclosure of such copies to Batris W. Perovich, Charles O. Davin, or any other employee or officer of any plaintiff without an express order of this Court permitting such disclosure.

"7. All persons who inspect any of the defendants' protected documents, or any microfilms or copies thereof are hereby enjoined and restrained from suffering or permitting disclosure of any of the documents, microfilms or copies thereof to any person not authorized by this Order to inspect the documents." [C.T. 3593, line 19, to page 3594, line 2].

that the Court extend the time within which the Plaintiffs were required to file their trial brief. [R.T. 3/18/67, page 77, lines 17-21].[14] For that reason, Judge Pence, at the conclusion of the hearing on March 18, extended the deadline for the pretrial briefs to April 27, 1967, in order to permit him to rule on the foregoing motions; the extension was incorporated into Pretrial Order No. 7. He indicated, however, that his disposition was clearly against granting them.

> "I will say very frankly that unless something new and different and much more cogent than has ever been presented is presented in support of these motions, that the Court will very probably not grant any of these motions. The situation here may be described, Mr. Weinstein, as heretofore done, that you have two strikes on you with Kofax [sic] delivering the third ball. You may be able to hit it, but you may strike out, but you have two strikes on you. I want to make that very clear." [R.T. 3/18/67, page 79, line 18, to page 80, line 21].

Judge Pence's message, delivered in baseball terminology, was indeed clear, and in light of it Mr. Weinstein immediately undertook to

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[14] Specifically, Judge Pence stated: "The Court, unless it were to summarily dismiss the motions without hearing, could not properly say that you should have the brief in by April 4th when the hearing is not until the 8th, and if it granted any of your motions, perforce that would change the total - -"
[R.T. 3/18/67, page 77, lines 17-21; emphasis added].

settle the cases, and ultimately succeeded in settling Plaintiffs' claims against every Defendant except United, resulting in the complete disposition of No. 63-321, and the elimination of all but one Defendant, United, in No. 63-278 and No. 63-279. [C.T. 3873, 3890, 3910, 3939].

The motions to file an amended complaint, for modification of the protective order, and for reconsideration and/or clarification of certain discovery orders came on for hearing on April 6, 1967.

United's opposition to these motions was based to a considerable extent upon unsworn statements of United's counsel, most of them oral, so that Plaintiffs' counsel did not even have notice of all of the contentions he would have to meet. [See, e.g. 4/6/67, page 32, line 13, to page 33, line 1, page 35, line 20, to page 36, line 15].

When Mr. Weinstein objected to such procedure, Judge Pence replied:

> "THE COURT: Now, now, counsel. I don't take this lack of affidavits nearly as seriously as you do . . . I judge each man that appears before me based upon his own attitude and my judgment of him, and I don't rate them all the same."
> [R.T. 4/6/67 (afternoon session) page 33, lines 5-10].

Each of the motions[15] was denied.[16] [R.T. 4/6/67, page 65,

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[15] The Court never formally ruled on the motion to file amended complaints. Appellant believes, however, that under the circumstances such failure to rule was tantamount to denial; and even if this Court does not feel that there is a ruling of the District Court to be reviewed, it can at least indicate to the District Court what it believes to be the proper disposition of the motion.

[16] Judge Pence had previously referred to accusations that he was a "liberal liberal" with regard to the amendment of pleadings. [R.T. 10/3/66, page 23, line 25, to page 24, line 9].

lines 10-16; (afternoon session) page 11, lines 10-13; (afternoon session) page 49, lines 10-16].

Pursuant to the court's order imposing sanctions, the payment of sanctions to United was due at 4:30 o'clock P. M. on that date, April 6. When Plaintiff's counsel indicated some uncertainty as to whether or not the sanctions would be paid, the court stated:

> "THE COURT: I will give your lone victory of the day, which usually is contrary. Ordinarily, it is the defendants who cry in their beer after they leave the courtroom. 'Well, we didn't get a single hit today.' I have heard that many times.
>
> I will give you your lone hit today. If you want another 24 hours, I will give it to you so that you have another 24 hours to decide what you want to do regarding the sanction."
>
> [R. T. 4/6/67 (afternoon session) page 50, lines 9-16].

On April 11, 1967, Plaintiffs filed a "Notice of Refusal to PaySanctions" in which they stated as their reasons for refusing to pay sanctions the following:

> "1. The order requiring the plaintiffs to pay sanctions exceeded the power of the Court;
>
> "2. The plaintiffs were financially unable to pay sanctions within the time ordered;[17]

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[17] Batris W. Perovich has stated before this Court in a document which is outside the record on appeal herein that funds to pay sanctions were available to Plaintiff's counsel on April 7, 1967; that Perovich urged his counsel to pay such sanctions, but that his counsel refused to do so. (Appellant's Reply to Counsel's Opposition to Appellant's Original Petition, Page 3). Perovich's counsel, circumscribed as they are by the Canons of Ethics governing an attorney's relations to his clients, can only point out that this representation is contrary to the record on which this case is being appealed.

"3. The orders of the Court setting the time for preparation of trial briefs, denying the plaintiffs personal access to the documents produced by the defendants, and limiting discovery into evidence of conspiracy as it affected the current pipe industry so hampered the preparation of the Plaintiffs for trial that it would have been a futile effort to pay said sanctions in order to avoid dismissal." [R.T. page 3877, lines 1-10].

Thereafter, on April 25, 1967, Plaintiffs filed "Plaintiffs' Memorandum Re Payment of Sanctions and Filing of Trial Brief" in which they stated that they now had sufficient funds generated from the settlement of claims against other Defendants in the action to pay the sanctions which were now due to United, and requested leave of the court to pay them:[18]

"The plaintiffs now have the funds with which to pay . . . sanctions and hereby offer to pay them in the event that the Court will permit them to now be paid even though the deadline of April 7 has passed." [C.T. 3934, lines 13-15].

In the same Memorandum Plaintiffs stated that because of the reduction in their burden due to the settlement of the claims against the other Defendants, they felt that it would be possible for them to complete preparation of the trial brief on or before June 15, and requested that the court grant them leave to do so:

"As the court knows, plaintiffs' new attorneys and present attorneys have contended that that task constituted an insuperable burden for numerous reasons which will not again be restated here.

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[18]When American Vitrified Products, Inc. was dismissed, the sanctions were reduced by one-third from $984.72 to $656.15; and when No. 63-321 was dismissed, the figure again reduced, this time to $328.08. [C.T. 3901-3902].

However, by reason of the dismissal of the three cases against all defendants except United, and by reason of the pending settlement between the plaintiff Inplace Linings and United, plaintiffs' attorneys believe that the concomitant reduction in the burden of the preparation of a trial brief is such that they can file the required trial brief by June 15, 1967. The remaining plaintiffs request that the court authorize and permit the plaintiffs to file their trial brief on or before June 15, 1967 and not to dismiss this action by reason of the plaintiffs' prior failure to comply with the Court's order regarding the payment of sanctions or their inability to file a trial brief by April 27, 1967.

Although there has been a genuine disagreement between the court and plaintiffs' counsel regarding the necessity for this time, it is submitted that the present posture of this litigation is such that no harm whatever will flow to the defendant United if the Court permits the remaining plaintiffs to proceed with its case so that United can test, on the much heralded motion for summary judgment, its theory that there isn't any possibility of there being a case against it."

[C.T. 3935, line 19, to page 3936, line 9].

On May 22, 1967, Judge Pence entered an "Order of Dismissal" [C.T. 3954], which was followed by a "Memorandum and Order of Dismissal" [C.T. 3957-3974], dismissing Plaintiffs' actions.

Thus none of the Perovich actions have ever gone to trial. After they had been pending for more than four years, after Perovich had incurred well over $100,000.00 in legal expenses in prosecuting the two actions in which he was interested; after extensive discovery had taken place, including many depositions [R.T. 3/18/67, page 71, lines 18-20],

and when they were on the verge of trial, the Perovich actions were dismissed for failure of the Plaintiffs to file a "trial brief" on the date ordered by the District Court, and failure of the Plaintiffs to pay sanctions of $328.08 to United.[19]

A Notice of Appeal was timely filed. [C.T. 3988-3989].[20]

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[19]The dismissal was as to the action below from which the instant appeal is taken and No. 63-279, the two actions in which Perovich was interested. The third action, Inplace Linings, Inc. v. Pipe Linings, Inc., et al, No. 63-321, had previously been dismissed by stipulation of the parties. [C.T. 3873; C.T. 3899; C.T. 3939].

[20]While Notice of Appeal was filed from the dismissal of both Perovich v. Pipe Linings, Inc., et al, No. 63-278, and Northwest Pipe Linings, Inc. v. Pipe Linings, No. 63-279, the latter appeal has since been abandoned.

ARGUMENT

A. AN EXAMINATION OF THE RECORD ON APPEAL MAKES IT APPARENT THAT THE ACTION BELOW HAS BEEN PROSECUTED WITH DILIGENCE. THE ONLY ACTION OF THE PLAINTIFFS WHICH ARGUABLY DELAYED PROSECUTION WAS PEROVICH'S DISCHARGE OF HIS ATTORNEY ON DECEMBER 14, 1966. BUT THE DISCHARGE WAS NOT FOR THE PURPOSE OF DELAYING PROCEEDINGS, BUT RATHER STEMMED FROM A DESIRE TO ACCELERATE THEM, AND THE DISTRICT COURT ACKNOWLEDGED THAT IT DID NOT JUSTIFY DISMISSAL.

Appellant is cognizant of the burden which a plaintiff assumes in attempting to persuade an appellate court that the trial court erred in dismissing his action for lack of diligent prosecution or failure to comply with court order. As Judge Pence points out in his "Memorandum and Order of Dismissal," dismissal on these grounds "rests within the discretion of this [the District] Court . . ." [C.T. 3969, lines 6-7].

Nonetheless, the extreme gravity of such a dismissal -- the deliberate aborting of a claim for relief by the institution established to grant the relief -- makes it imperative that the appellate court carefully review the action of the district court to determine if its discretion has been abused; and there are a host of cases in which abuse has been found to be present.

Jefferson v. Stockholders Pub. Co., 194 F. 2nd 281, 282 (9th Cir. 1952)

Meeker v. Rizley, 324 F. 2nd 269, 271 (10th Cir. 1963)

Stanley v. Alcock, 310 F. 2nd 17, 20 (5th Cir. 1962)

Red Warrior Coal & Mining Company v. Baron, 194 F. 2nd, 578, 580 (3rd Cir. 1952)

In determining whether a particular dismissal was proper, the appellate court must take into account that dismissal with prejudice is a harsh, indeed the ultimate, sanction which a court can impose upon a litigant. It militates against the fundamental policy of Anglo-American -- and, indeed, all enlightened systems of -- jurisprudence, that cases should be disposed of upon their merits. As stated in Davis v. Operation Amigo, Inc., 378 F. 2d 101 (10th Cir. 1967):

> "A dismissal, with prejudice, is a harsh sanction and should be resorted to only in extreme cases. . . . The judge must be ever mindful that the policy of the law favors the hearing of a litigant's claim upon the merits." [378 F.2d at 103].

Accord:

Bon Air Hotel Inc. v. Time, Inc., 376 F. 2d 118, 121 122, (5th Cir. 1967).

Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730, 733, (2nd Cir. 1960).

Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2nd Cir. 1959)

Hence the District Court should exercise forbearance, and dismiss only when a plaintiff's actions are so disruptive as to cause the need for the orderly administration of justice to outweigh the goal of affording the litigant his day in court and resolving his case on its merits.

Such forbearance, Appellant submits, should, for a variety of reasons, be particularly great with respect to the plaintiff in an antitrust action. For one thing, it is the policy of Congress to favor and encourage private antitrust actions. As stated by the United States Supreme Court with reference to the enactment of Section 5 of the Clayton Act [providing that a final judgment in a government antitrust prosecution is prima facie evidence of an antitrust violation in a private antitrust action], "Congress itself has placed the private antitrust litigant in a most favorable position . . ." [Radovich v. National Football League, 352 U.S. 445, 454 (1957).] The reason for this

olicy is that the antitrust plaintiff is not merely redressing a private wrong; ather, he is relieving the government of a portion of the burden of combating ommercial conduct inimical to the social welfare:

"It was originally hoped that this [the treble damage provision of the antitrust law] would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the government time and money."

Committee on the Judiciary Senate Report No. 619, 84 Cong. First Ses. (1955)

he importance of the private antitrust litigant as an instrument for carrying ut governmental policy has been recognized by this Court.

Karseal Corporation v. Richfield Oil Corporation, 221 F. 2d, 358, 365 (9th Cir. 1955)

Mach-Tronics, Incorporated v. Zirpoli, 316 F. 2d 820, 828 (9th Cir. 1963)

Secondly, the burdens under which an antitrust plaintiff commonly unctions -- particularly when he does not have the benefit of Section 5 of the layton Act -- are immense. The disparity in economic resources as between the laintiff and the defendants whom he is challenging is frequently considerable, ffording the defendants a significant strategic advantage. In addition to ack of sufficient financial resources, the antitrust plaintiff commonly has ormidable problems of proof stemming both from the complex nature of the ases and the simple fact that usually most of the evidence is in the possession f the defendants. The antitrust plaintiff who manages to overcome these bstacles and carry his case through trial is a doughty fellow indeed.

Obviously, justice must be administered in an orderly fashion, and

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1 Indeed, the socially useful role which an antitrust litigant can play could hardly be better exemplified than by Perovich himself. It was as a consequence of his action --"the man who blew the whistle"--that a vast conspiracy in the steel and concrete pipe industries was revealed and presumably, broken up.

gardless of the nature of his claim. But, Appellant submits, the govern-
ental policy favoring private antitrust suits and the peculiar difficulties
ich an antitrust plaintiff encounters are factors which a district court must
ke into account in exercising its discretion.

Other such factors include prominently the motives from which the
ck of diligent prosecution or noncompliance with court orders arose,[22]

In most of the cases which the District Court cites in justification of the dismissal the noncompliance stemmed from a deliberate desire to delay proceedings or to disobey the Court's orders, either on the part of the plaintiff or his attorney.

In Link v. Wabash Railroad Company, 370 U. S. 626 (1962) the Supreme Court justified the decision of the Court of Appeal in affirming the dismissal of the action by pointing out that "it could reasonably be inferred from his absence [at a pretrial conference], as well as from the drawn out history of the litigation. . . that petitioner has been deliberately proceeding in dilatory fashion." (370 U. S. 633). There was a dissenting opinion by Justice Black, concurred in by Chief Justice Warren [Justice Douglas also dissented and two other Justices took no part in the decision of the case], in which the decision of the District Court was held erroneous because, in fact, it had not "relied on all the circumstances of this case, including 'earlier delays' to justify its dismissal with prejudice" (370 U. S. 638).

In Janousek v. Wells, 303 F. 2d 118 (8th Cir. 1962), the Court of Appeal found from the record that the plaintiffs "impeded the progress of the litigation by every obstacle and maneuver which their ingenuity could command." (303 F. 2d 122).

In Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co. 310 F. 2d 938 (5th Cir. 1962) there was a long history, extending over several years, of disregard for the Court's orders.

In Edmond v. Moore - McCormack Lines, 253 F. 2d 143 (2nd Cir. 1953) the plaintiff had changed counsel nine times during the course of the litigation and failed to appear on the morning of the trial. The judge continued the trial to the afternoon and ordered the plaintiff to appear or to provide a doctor's certificate that he was too ill to attend. He did neither and the case was dismissed. The Court of Appeal affirmed the dismissal stating ". . . the judge in ordering the dismissal might reasonably have concluded that the plaintiff's default of appearance was not caused by illness but was an unduly belated maneuver to obtain yet another postponement." (253 F. 2d 144).

In Slumbertogs, Inc., v. Jiggs, Inc. 353 F. 2d 720 (2nd Cir. 1965) cert. den. 383 U. S. 696, the facts of the case are not set forth in the opinion, but the Court of Appeals referred to the "Dilatory and contumacious conduct of plaintiffs and their counsel in virtual defiance of the rules and orders of at least six judges of the district court. . ." (353 F. 2d 720).

prejudice to the defendant,[23] and whether there are extenuating circumstances such as difficulties encountered by the plaintiff's attorney and the need for new personnel to familiarize themselves with the issues of the case.[24]

Appellant respectfully submits that an examination of all of the facts and circumstances surrounding the dismissal of the action below reveals that dismissal was unwarranted, arbitrary, unjust and an abuse of the District Court's discretion.

The action below was commenced in March of 1963. The incident which precipitated the events that ultimately led to dismissal was Perovich's discharge of his exhausted then attorney, John Joseph Hall, Esq., on December 14, 1966. There is nothing whatever to indicate that

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[23] True, the absence of a direct showing of prejudice to the defendant from delay will not, in itself, require reversal of an order of dismissal since prejudice will be "presumed" from the fact of delay. Pearson v. Dennison, 353 F. 2d 24, 28-29 (9th Cir. 1965). Nevertheless, prejudice to the defendant is obviously a relevant consideration. Wholesale Supply Co. v. South Chester Tube Corp., 20 F. R. D. 310, 313 (E. D. Pa. 1957). In Livingstone v. Hobby, 127 F. Supp. 463, 464 (E. D. Pa. 1954), the Court held that an unexcused seven-month delay in delivering the summons and complaint to the marshal for service did not warrant dismissal for lack of diligent prosecution when the defendant was not prejudiced from the delay.

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[24] As stated in Stanley v. Alcock, 310 F. 2d 17 (5th Cir. 1962), "It is clear that a new Trustee [appointed upon prior Trustee's death] would have a reasonable time after appointment and substitution to acquaint himself with the issues of the case and that it ought not to be dismissed without taking that situation into account. The final judgment entered by the court below on September 16, 1960 recites various acts which were done between February 29, 1960 and the date of such entry. Plaintiff's attorney was, during that entire period, beset by many difficulties in producing his proof, most of which had to be obtained from his adversaries. This fact, plus the change of trustees, furnished extenuating circumstances which lead us to the conclusion that the court below ought not to have exercised its discretion so as to dismiss the action for want of prosecution. (310 F. 2d 20; emphasis added.)

during the intervening period the Perovich actions were prosecuted with lack of diligence. Indeed, precisely the contrary is true. Extensive discovery was taken, a record consisting of thousands of pages amassed.[25] Plaintiffs' counsel, John Joseph Hall, Esq.,[26] a sole practitioner, was "working a seven-day week" on the Perovich cases since August of 1966. [R.T. 1/17/67, page 73, lines 5-15], and was exhausted. [R.T. 1/17/67, page 76, lines 3-8]. Judge Pence felt that Mr. Hall "was pacing himself too hard" and warned him, "John, for heaven's sake, give yourself enough time . . . You'll kill yourself [from overwork]." [R.T. 3/18/67, page 17, lines 1-12]. Perhaps most important of all, by December of 1966 the Perovich actions were nearly ready for trial.

In short, it is clear beyond peradventure that there is nothing in the conduct of either Perovich or his counsel for the period prior to December 14, 1966, that would even remotely justify dismissal; and that, in fact, the actions were prosecuted with salutory vigor.[27] Thus, if the dismissal is to be upheld, it must be because of events occurring on and after December 14, 1966.

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[25] The size of the record in itself is eloquent testimony to the intensity of the battle, and certainly raises an inference of diligence on the part of Appellant.

[26] The record indicates that Perovich was dissatisfied with and ultimately discharged his first counsel, Richards D. Barger, Esq., because he was too lenient in giving continuances to the Defendants. [R.T. 1/17/67, page 105, lines 3-8.]

[27] Judge Pence's "Memorandum and Order of Dismissal" refers critically to the eight to nine months hiatus in discovery which occurred when Hall made a "gracious side-step" [C.T. 3961, line 29] and gave up Plaintiffs' trial priority so that certain other western pipe cases could be tried. But the hiatus in discovery was imposed by order of Judge Pence for the benefit of Defendants and over Mr. Hall's objections. [C.T. 2206-2211; 3962, lines 5-12.]

The event which stands as the root cause of the Court's displeasure s obviously Perovich's discharge of John Joseph Hall, Esq., and Mr. Hall's ubsequent withdrawal from the representation of Inplace Linings, Inc.[28] R. T. 3/18/68, page 73, lines 15-19.]

Appellant does not comment upon the wisdom of such a step. That t delayed the trial of the Perovich actions is perhaps a permissible, hough not inescapable, inference. It is not at all certain that Hall would ave been able to complete the trial brief in sufficient time to permit the ase to be tried on February 13, 1967; and unless this date was met, other ommitments would likely have prevented Judge Pence from trying the ctions for a considerable time thereafter. [R. T. 1/17/67, page 175, line 8, to page 176, line 2.]

It is important to note, however, that Perovich discharged Hall, ot from a desire to delay the trial, but, rather from a zeal to accelerate he prosecution of the case and meet the February 13th trial date. Once he emotional spasm in which he had acted passed and he came to appreciate he consequences of his action, he attempted to remedy whatever disruption t might have caused. On December 16th, just two days after the discharge, e asked Mr. Hall to come back into the cases. Mr. Hall refused. [R. T. /17/67, page 151, line 17, to page 152, line 16.] Several weeks later, when is multi-state sojourn to find other counsel was proving fruitless, he sked Mr. Hall to finish the trial brief. Again Mr. Hall refused.[29] [R. T.

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8 This was a case in which Judge Pence punished Davin for the "sins" of Perovich.

9 Mr. Hall's attitude is not surprising. As Judge Pence said, the Perovich actions had been "giving him nightmares for months - and seven days a week of them . . ." [R. T. 1/17/67, page 175, lines 9-11.] Undoubtedly, it would have been difficult for a large firm, much less a sole practicioner, to comply with the pretrial schedule which the District Court imposed.

/17/67, page 151, lines 4-16.] He did, in other words, everything he could lo to ameliorate the situation he had created. As Judge Pence himself found, he discharge was not a "ploy on the part of the plaintiffs to get more time " R.T. 1/17/67, page 173, lines 1-5], and the District Court did not feel -- it least at the time -- that Perovich's discharge of Hall warranted mposition of the sanction of dismissal.

If Perovich's discharge of his attorney did not warrant dismissal vhat did?

In its "Memorandum and Order of Dismissal" the District Court efers to four or five postponements of the date for filing the trial brief, mplying that the Court had extended Appellant great indulgence but that Appellant treated the Court like "a race track", and the Court decided he iad "fouled once too often". [C.T. 3792, lines 21-23]. The facts, Appellant ubmits, are to the contrary. It would be a more apt metaphor to describe Appellant as a struggling swimmer who was thrown a number of lines, each a few feet short.

The due date was originally set in Pretrial Order No. 4 for December 5, 1966. Mr. Hall never accepted this deadline and Judge Pence himself made it clear that he would not hold Hall to it but, indeed, encouraged him o take more time. [R.T. 1/17/67, page 71, lines 14-19.]

The next due date, contained in Pretrial Order No. 5, was January 3, 1967. It was set on December 30, 1966, after Hall had been discharged ind while Perovich was attempting to secure, but had not yet succeeded in ecuring new counsel. Its effect was to give whatever counsel Perovich night retain (assuming that counsel was retained immediately) two weeks n which to, in effect, become prepared to try three complex antitrust ases, each dealing with a different geographical area, involving inter alia, ndercost job bidding and a market allocation conspiracy, which had been

pending for four years and in which a very large record had accumulated Could any attorney have reasonably been expected to comply with such a deadline?[30]

The due date for the trial brief was next set in Pretrial Order No. 6 for April 4, 1967. The Court makes a great point of the fact that this date was accepted by plaintiff's new counsel and characterized as "more than generous." [C.T. 3967, lines 25-32]. This is, of course, true, but few indeed are the occasions in the law when a party -- and here it was not even a party but a party's counsel[31] -- is held inexorably to his word, regardless of the circumstances, and this certainly should not be one of them.

For one thing, an examination of the transcript of hearing and the record reveals some of the pressures under which Mr. Weinstein was operating. He was the only attorney, in a search that took him as far away as Texas, that Perovich was able to find willing to assume the burden of the three actions. The April 4 deadline was presented by the District Court as an ultimatum -- take it or leave it. If Mr. Weinstein did not take it, the possibility of dismissal was apparent.[32]

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30 The District Court's reference to the possibility of dismissal at the December 30th pretrial conference [R.T. 12/30/66, page 10, lines 2-9] was, to say the least, premature, and arguably reveals a disposition on the part of the Court toward the Perovich actions lacking the understanding which might have been expected.

31 This circuit has indicated that the behavior of plaintiff's attorney is not in all circumstances attributable to plaintiff for purposes of determining the propriety of dismissal. Russell, et al. v. Cunningham, et al., 279 F.2d 797, 804 (9th Cir. 1960).

32 Why Judge Pence should be concerned about the timing of a trial brief when it was tied to a trial date is understandable. Why he should have been so concerned about its timing at this particular juncture in the proceedings is not. When the February 13th date was passed, Judge Pence could not simply advance the trial date to compensate for the

Second, far more important than what Mr. Weinstein said he could do is what in fact occurred during the period between January 18th and April 4th. The Court stated in its memorandum of dismissal that Perovich's conduct subsequent to January 18 "must be viewed as devices for securing delay." [C.T. 3972, lines 5-6]. Appellant does not question the Court's sincerity in making such a statement; but, however the situation may have appeared to the Court, the charge is flatly incorrect.

On the contrary, after January 18th Plaintiff's counsel made an extreme effort to move the cases along. Though other commitments precluded Mr. Weinstein from devoting all of his time to the three Perovich actions, he devoted a very substantial portion of his time to them, including many weekends and evenings. [C.T. page 3644, lines 19-30]. More than that, he promptly secured the services of another attorney who was assigned to work full time on the Perovich actions and who, in fact, made substantial progress in analyzing the voluminous record with which he had to deal. [C.T. page 3649, lines 13 to page 3650, line 4].

Finally, and most important, it is obvious that at the time of this acceptance and counsel's polite but gratuitous characterization of the District Court's action as "more than generous", counsel did not know of a number of material factors bearing upon his ability to meet the deadline. One does not always know that a fruit is spoiled until he bites into it, and Appellant's counsel did not appreciate the difficulties of the task of preparing the trial brief until he assumed it. He made a number of unsettling

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(Continued)
additional time required to complete the trial brief because of other commitments which he had. He was not even willing to schedule the trial at all, saying it "might be in 1967. It might not be until 1968. I don't know." [R.T. 1/17/67, page 176, lines 1-2].

discoveries.

First, it was not clear from the complaints that two of the three actions (No. 63-378 and 63-321) contained claims for a violation of Section 2 of the Sherman Act [C. T. 3701, lines 16-25].[33]

Second, he discovered that the 90,000 documents that were located in a documents depository at the offices of United's counsel and that would have to be reviewed in connection with the preparation of the trial brief, because of the trade and technical terminology in which they were couched, were unintelligible to him; and the two persons available to him who had the expertise to assist him in interpreting the documents were precluded by a Court order from doing so. [C. T. 3749, line 10 to page 3753, line 5; Exhibits 1 through 5 to Affidavit of Les J. Weinstein, C. T. pages 3703-3710].

Third, he learned that there were ambiguous rulings of the District Court, never incorporated into any formal Court order, concerning discovery on matters relating to the Defendants' alleged conspiracy to fix prices, allocate territories and customers in the sale of concrete pipe, and that the Defendants took the position that they had produced everything that they were required to produce. [C. T. 3699, line 12, to page 3700, line 14].

Fourth, he discovered the sorry and incomplete state of the record that he had inherited; that the files of the three actions were in such poor condition that it was necessary forPlaintiffs' counsel to devote a substantial amount of time just to the mechanical matter of putting together a complete set of files. [C. T. 3645, line 11, to page 3646, line 11].

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33 That this discovery was not made until after January 18, 1967, is not surprising since Perovich's new counsel did not finally receive a true copy of one of the complaints until March 13, 1967. [C. T. 3646, lines 1-11].

So far as the latter problem was concerned, Plaintiffs' counsel had
al alternative except to put the files in order as expeditiously as pos-
. But the first three problems presented a serious dilemma. Two
natives were open to Plaintiffs. The first was to disregard the possible
t in the pleadings, disregard the 90,000 documents which the Defendants
produced, accept the Defendants' interpretation of certain discovery
rs even though the Plaintiffs might, in fact, be entitled to certain
ly important additional discovery, and attempt to produce within the
licable time limit a trial brief. Undoubtedly this would have been the
rse of least resistance for Plaintiffs' counsel. The obvious difficulty with
s that the trial brief would, of necessity, reflect circumstances under
ich it was written; its ability to withstand Defendants' motion for summary
lgment would be problematical and certainly it would not afford Plaintiffs the
st foundation for the trial of the action.

The second alternative was to bring these matters before the District
ourt for adjudication, even though preparation of the appropriate motions
ould require such diversion of time away from the trial brief as to preclude
ling it by April 4. It was this course which Plaintiffs chose.[34]

On March 14 and 17, respectively, Plaintiffs filed a complex of four (4)
notions, aggregating in excess of 100 pages. The first was for an extension
of time to file the trial brief "on the ground that Plaintiffs' counsel are unable
to properly prepare said briefs until certain other motions are decided, and
on the ground that Plaintiffs' counsel are unable to fully familiarize themselves

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34 The effect of requiring a plaintiff to make such a choice under penalty of dismissal if his motions should not be granted is tantamount to the court requiring a plaintiff to compromise his case, perhaps fatally, for the privilege of getting it to trial.

with all of the files, depositions and documents involved in these cases and to fully prepare pretrial briefs meeting the requirements of Pretrial Order No. 6 within the time period set in said Pretrial Order." [C.T. page 3635, lines 18-25]. The other three were as follows:

(a) a motion seeking leave to file an amended complaint in No. 63-278 and 63-321, alleging violations of Section 2 of the Sherman Act;

(b) a motion seeking clarification and/or reconsideration of the Court's order on certain discovery matters in light of the decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962);

(c) a motion seeking modification of the Court's order prohibiting Charles O. Davin and Batris W. Perovich from viewing the documents on file in the document depository.

The motion for an extension of time to file the trial brief was heard on March 18, 1967, but the other motions were not scheduled to be heard until April 6, 1967, two days after the trial brief was due. Judge Pence admitted that if any of the latter motions were well taken, he would be bound to extend the due date for the trial brief. [R.T. 3/18/67, page 77, lines 17-21].

His disposition as to these motions, however, may be inferred from the following statement:

> "The situation here may be described, Mr. Weinstein, as heretofore done, that you have two strikes on you with Kofax [sic] delivering the third ball. You may be able to hit it, but you may strike out, but you have two strikes on you. I want to make that very clear." [R.T. 3/18/67, page 79, line 18 to page 80, line 2].

Since the trial brief was due before the hearing on the motions and the District Court claimed he did not want "to dismiss them [the Perovich actions]

page 78, lines 10 - 13; page 80, lines 7 - 21]. It is apparent that except for the filing of the motions, the District Court would not have granted this final extension.

This attitude of the District Court once again put Plaintiffs' counsel in a dilemma. He could have dropped everything and devoted all remaining time to the preparation of what he felt, if the motions were denied, would be an inadequate trial brief and which he might not be able to finish on time. (Moreover at least until April 6th when the motions were decided, he wouldn't know definitely what the content of the brief would be or what his factual foundation would be). Or he could devote his efforts to salvaging as much as possible through what would, of necessity, be bargain-basement settlements. There being only 24 hours in the day, he could not do both.

He chose the latter course, and eventually succeeded in settling substantially all of the claims except those against United. Hence, while he was not working directly on the trial brief, he was working toward resolution of the cases.

On April 6th, the pending motions were heard.

In support of the motion to amend, Plaintiffs pointed out, inter alia, that:

> "(a) There is no basic change in the second amended complaints in the facts alleged;
>
> "(b) The First Amended Complaints already on file advise the defendants and each of them that they are being charged with monopolization and therefore no element of surprise is involved in regard to the specific delineation of a Section 2 case;

"(c) No motions for summary judgment (except for Centriline) have yet been filed, nor have the cases been set for trial;

"(d) Sections 1 and 2 of the Sherman Act are closely related and overlapping and ordinarily must be construed together for analytical purposes; hence there is no major alteration in the legal principles involved which the defendants will be called upon to meet;

"(e) The Defendants are represented by able law firms which are experienced in antitrust matters and to which Section 2 of the Sherman Act is, at least in the concrete pipe industry, for the most part an old acquaintance;

"(f) In addition to the three Perovich cases, the defendants are and/or were involved in a large number of other related antitrust cases (including the No-Joint cases) on behalf of the same clients, a number of which involve Section 2 of the Sherman Act. Accordingly, the attorneys and the clients are both undoubtedly familiar with the applicability of Section 2 of the Sherman Act to their business activities;

"(g) The Defendants collectively control a substantial portion of the inplace lining and rehabilitation of pipe business as well as the concrete pipe business and are undoubtedly well versed in market conditions and have at their disposal any necessary experts, market data and other factors which might arguably be peculiar to a Section 2 Sherman Act monopolization case. Sections 1 and 2 of the Sherman Act are admittedly separate. [C. T. 3723, line 14 to 3742, line 21]."

For a discussion of the merits of this motion, see C. T. 3721, line 7 to

The motion for modification of the protective order was supported by a number of affidavits. Les J. Weinstein, Esq., a lawyer with considerable antitrust experience, who had a bachelor of science degree in mechanical engineering and had been licensed to practice before the Patent Office, stated that he found most of the documents in the document depository unintelligible to some degree [C. T. page 3750, lines 27-32]. W. Z. Jefferson Brown, Esq., an attorney, stated that having read most of the depositions in the Perovich actions "was not sufficient to enable me to make a meaningful interpretation or thorough analysis of those documents which I examined in the document depository". [C. T. page 3712, lines 7-9]. Batris W. Perovich stated that:

> "based upon my experience in the business of inplace lining and/or rehabilitation of pipe, the knowledge that I have obtained from other depositions in the Perovich cases, and the knowledge I have obtained from examining the documents which were used as exhibits in connection with those cases, it is my belief that no person not thoroughly familiar with the inplace lining and/or rehabilitation industry, the names of the people involved therein, the trade terminology used in the industry, and the methods used in bidding could understand with sufficient clarity the documents that I have seen without assistance from someone knowledgeable in the industry or without spending lengthy periods of time dwelling over the documents.
>
> "I know of no person not presently associated in one way or another with one of the defendants herein who is presently available and willing to assist my attorneys in analyzing the documents contained in the document depository, except Charles O. Davin and myself." [C. T. page 3714, lines 15-31].

John Joseph Hall, Esq., a patent attorney, public accountant, and holder of a chemistry degree, stated that:

"With respect to both plaintiffs' and defendants' documents concerning the inplace lining and rehabilitation of pipe inplace, I was unable to properly evaluate such documents in a meaningful way by myself, because of the abbreviations used, the nomenclature of the lining business, variations in trade terminology and calculations peculiar to the lining business contained in such documents.

"Before using any documents in any discovery depositions, I found it necessary to consult with my clients regarding the meaning of information contained in such documents, because the information contained in such documents required interpretation and analysis which could be given only by a person experienced in the lining business. Such documents in discovery depositions included information regarding estimating data, pricing and cost date, and computations regarding lining jobs.

"The documents produced by the defendants in these cases pursuant to Court order which I have seen contain similar information to that contained in documents I used in discovery depositions and before these documents can be properly analyzed and evaluated they must, in my opinion, be inspected by a person familiar with the business of inplace lining of pipe.

"Due to the trial court's protective order of December 20, 1966, forbidding any of the Plaintiffs' to inspect Defendants' property, documents produced after October 24, 1966, I was unable to examine or evaluate such of defendants' documents that I did inspect after October 24, 1966, for purposes of trial preparation,

since I had no assistance from a person experienced in the lining business.

"Aside from plaintiffs' and defendants' employees I know of no person, either individually, or in a particular profession, who has the ability to properly examine or evaluate documents relating to the inplace lining business, particularly with respect to estimating lining jobs and determining whether such jobs were estimated or bid below cost.

"It is my belief, based upon my experience and my knowledge of the industry, that the problems involved in interpreting and analyzing these documents are not limited to problems of an accounting nature and that a person who could assist counsel would have to be or have been engaged in some capacity in the business of rehabilitating and/or lining pipe." [C. T. page 3718, line 11, to page 3719, line 18].

The original justification for the protective order was the protection of Defendants' "trade secrets". Plaintiffs pointed out that Perovich was no longer in the pipe lining business and had no present intentions of returning to it; that "the age of the information contained in the documents diminishes their usefulness in any event," and that Defendants "did not feel that the production of these documents presented such a threat to their ability to carry on their business in this allegedly competitive industry, that they needed any special provision barring the employees or agents of each other from access to the documentary depository or from making use of the material contained therein." [C. T. page 3737, line 15 to page 3738, line 20].

The motion for clarification and/or reconsideration with regard to

discovery involved certain interrogatories and documents sought in a motion to produce which pertained to a general conspiracy in the sale of concrete pipe. Defendants had filed objections to the interrogatories and motion to produce; the principal ground of their objection was that, absent a prior showing of a link between the general conspiracy and the instant actions, such discovery was improper. [C.T. page 3709, lines 14-26].

Plaintiffs pointed out to the District Court that such a restrictive position was in contradiction of, and would constitute reversible error under, the decision of the United States Supreme Court in Continental Ore Co. v. Union Carbide, 370 U.S. 690, 698-700 (1962); and, in fact, since Judge Pence had permitted discovery with regard to the general conspiracy in the "No-Joint" cases, other "western pipe case" actions, without the showing of such a prior link [C.T. page 3741, lines 13-26], consistency would seem to have required the same decision in the Perovich actions.

Defendants disputed Plaintiffs' position on factual as well as legal grounds. For example, United's response to the sworn statements, referred to supra, that the documents in the document depository were not unintelligible and could not be adequately interpreted except by someone in the inplace mining industry, was the unverified assertion during oral argument of United's counsel, ". . . it is a rather simple task to go through . . . and analyze his stuff. My Secretary did it . . ." [R.T. 3/18/67, page 42, lines 12-14].[35]

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[35] When, however, Defendants' counsel was asked the meaning of a term selected from one of the documents, "modified proctor", none of them, including United's counsel, was able to do so [R.T. 3/18/67, page 67, line 16 to page 68, line 9].

Mr. Weinstein objected vehemently and repeatedly to such unsupported unsworn assertions of United's counsel, pointing out that their effect was to deny him a meaningful opportunity to respond, but the Court's attitude is evidenced by the following:

> "Now, now, counsel [to Mr. Weinstein], I don't take this lack of affidavits nearly as serious as you do. . . . I judge each man that appears before me based upon his attitude and my judgment of him." [R.T. 4/6/67, page 33, lines 5-9].

Thus, the factual showing upon which Plaintiffs based their motions was uncontroverted and demonstrated that the motions were essential in order to permit Plaintiffs' to properly present their cases. Furthermore, while the granting of the motions or any of them would have required, in the Court's own view a delay in the filing of the trial brief, there is no reason to believe that such granting would have delayed the trial. Judge Pence himself had clearly indicated that the trial would not be until late 1967 or 1968.

Nevertheless, the motions were denied. (See footnote 15, supra).[36]

In his "Memorandum and Order of Dismissal, the Court implies that

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[36] In the interests of avoiding unnecessary repetition, Appellant will not burden this Court with a separate section devoted to the review in and of itself of the denial of these motions by the District Court. Nonetheless, this Court does have the power to review the denials on the instant appeal [Siebrand v. Gosnell, 234 F. 2d 81 (9th Cir. 1961)] and Appellant is seeking such review herein. Appellant believes that the action of the District Court in denying these motions was erroneous and should be reversed, thus obviating possible review of the rulings on a future appeal. [For an extended discussion of the motions, see C.T. 3653-3744].

Plaintiffs' action in filing a "Notice of Refusal to Pay Sanctions", and then a request for leave to pay the sanctions and an extension, was some sort of a deliberate tactic by Plaintiffs. [C. T. 3972, lines 4-27]. But what conceivable purpose could Plaintiffs have hoped to serve by filing the Notice of Refusal if they at the time intended thereafter to ask for leave to pay sanctions and for an extension? Certainly, it would not assist them, should they thereafter seek a further extension. Its obvious purpose was exactly that which it purported to be - - to advise the District Court of Plaintiffs' intentions.

Later, however, Plaintiffs' circumstances changed. The settlements generated funds from which the sanctions could be paid, and reduced the burden of the litigation. Consequently, the remaining Plaintiffs felt that in view of this lightened burden, it would be possible for them to prepare a trial brief by June 15 and on April 25, requested leave to do so and to pay the sanctions to United.

Appellant respectfully submits that these facts belie the charge that the "plaintiffs deliberately, openly and knowingly defied" the Court's orders, or that Plaintiffs had a "dilatory history" - - the grounds on which dismissal was predicated. [C. T. 3973, lines 3-6]. It would perhaps be more accurate to say that after Perovich's discharge of Hall, the District Court created an appearance of indulgence to Plaintiffs without ever really giving them an opportunity to do what they had to do. The District Court says that the "courtroom is not a race track on which a party can jockey at will without fear of being disqualified." [C. T. 3972, lines 20-22]. This is true, but neither is it a baseball diamond on which a judge can emulate a famous pitcher by throwing fast balls at counsel. Perovich is not above reproach in his conduct of the trial; neither are most litigants. The record shows that Perovich and his counsel, through four long years, prosecuted his actions

vigorously. For the District Court to have dismissed the action below when it was in such an advanced state, when Perovich and his counsel were working so feverishly to undo whatever wrong Perovich may have done by dismissing Hall, was a grave injustice. It should not be allowed to stand.

B. APPELLANT BELIEVES THAT THE IMPOSITION OF SANCTIONS, WITH THE THREAT OF DISMISSAL IF THEY WERE NOT PAID, WAS IMPROPER IN VIEW OF THE DISTRICT COURT'S ACKNOWLEDGMENT THAT THE ACT FOR WHICH THE SANCTIONS WERE IMPOSED DID NOT ITSELF WARRANT DISMISSAL. IN ANY EVENT, HOWEVER, IT WAS MANIFESTLY AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO PERMIT THE SANCTIONS TO BE PAID ONLY EIGHTEEN DAYS LATE WHEN PLAINTIFF DID NOT HAVE THE FUNDS AVAILABLE ON THE DUE DATE, AND THERE WAS NO SHOWING WHATEVER THAT THE LATE PAYMENT WOULD IN ANY WAY PREJUDICE THE REMAINING DEFENDANT.

In determining whether the District Court acted properly in dismissing he action below for failure of Appellant to pay sanctions on April 7, the initial uestion to be considered is whether the order imposing sanctions was itself awful. Appellant submits that it was not.

First, and most basically, Appellant does not believe that the conduct f the Plaintiff for which sanctions were imposed -- the discharge of Mr. Hall nd consequent failure of Plaintiff to meet the deadline for the trial brief set n Pre-Trial Orders No. 4 and 5[37] -- warranted their imposition. (See Section V, A, supra).

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7 In fact, the December 15 deadline contained in Pre-trial Order No. 4 would not have been complied with in any event, despite Mr. Hall's seven-day-week working schedule, and Judge Pence had encouraged Mr. Hall to take more time if he felt he needed it. Whether Mr. Hall

Secondly, let us assume arguendo that Perovich's discharge of Mr. Hall was in itself sufficient to justify the imposition of sanctions--this despite[38] the vigor with which the Perovich actions had heretofore been prosecuted; despite the fact that Perovich's action was motivated not by a desire to delay proceedings, but rather to prevent delay; despite the fact that Perovich did everything within his power to ameliorate the condition which his discharge of Mr. Hall had created, including(and it must have required no little pride-swallowing) asking Mr. Hall to return to the cases. The sanctions were still unlawful because of the means by which they were assessed.[39] The purpose of the sanctions was to compensate Defendants for additional legal expense which they had been caused by Mr. Hall's discharge, yet the amount of the sanctions was assessed on the basis of unverified statements of Defendants' counsel, which included inter alia charges for time spent after the date on which the court ordered the sanctions imposed and even time spent by counsel of the various Defendants in conferring with each other and about the sanctions. Is the imposition of sanctions on this kind of a basis compatible with proper judicial process?[40]

(continued)

would have been able to complete the trial brief by January 13, the due date specified in Pretrial Order No. 5, is possible, but in view of Mr. Halls' testimony (R. T. 1/17/67; page 70, line 18 to page 73, line 17), and not withstanding his representation to the contrary, far from certain.

38 Since sanctions were ordered imposed upon Plaintiff on January 17, 1967, (though the formal Order was not entered until later), sanctions were proper only if events up to that date--without regard to subsequent developments in the case--warranted them.

39 Indeed, Judge Pence followed the novel procedure of at least technically ordering the sanctions paid to Defendants' counsel rather than to Defendants themselves.

40 Equally shocking is Judge Pence's treatment of Inplace Linings, Inc., the Plaintiff in No. 63-321, of which Mr. Davin was president. Any "wrong" that may have been committed in discharging Mr. Hall was committed by Perovich, and by Perovich alone. Indeed, the close identity of the Inplace Linings action with the two actions in which Perovich was interested came

Finally, whether or not the sanctions were deserved and properly assessed by Judge Pence, the fact remains that Plaintiffs tendered such sanctions as soon as the necessary funds became available. It is true that his tender was not made until April 25, 1967, eighteen days after the due date of April 7, 1967. But the ostensible purpose of the sanctions was to compensate Defendants for the injury which the discharge of Mr. Hall had caused them. There is no reason whatever to believe that such compensation to the one remaining defendant would have been less adequate if paid on April 25, than on April 7. Indeed, because of the settlement of various actions, the sanctions payable to United's counsel had been reduced from almost $1,000.00, to $328.08; hence, since the sanctions were a consideration in the settlement, by April 25 United had already received partial compensation.

Appellant submits that the sanctions were improperly assessed against him; and even if they were not, there was substantial compliance with the Court's order imposing such sanctions.

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continued)
about because the District Court, presumably in the interests of economy of judicial administration, had ordered the three cases consolidated for pre-trial and discovery purpose. [C. T. page 1429]. Yet, Judge Pence, despite Inplace Linings' total innocence, imposed the sanctions, with the underlying threat of dismissal, upon the three actions jointly and severally and without distinction.

CONCLUSION

In his Memorandum and Order of Dismissal, Judge Pence depicts an indulgent court finally driven to resort to the ultimate sanction of dismissal by a contumacious litigant who, in his words, treated the Court like a "race track" and "fouled once too often". While he is undoubtedly sincere in this appraisal; nonetheless it is evident that such a characterization is wholly incorrect. On the contrary, the Plaintiffs made every attempt to go forward with the cases, and the record on appeal -- including that portion dealing with the period after new counsel were substituted in -- is mute testimony to their efforts. The only act of Appellant which was even arguably wrongful -- his discharge of his exhausted attorney -- was motivated not by a desire to delay proceedings but rather to accelerate them, and Judge Pence acknowledged that it did not warrant dismissal.

Even the best of judges occasionally make bad mistakes. Judge Pence is a good judge who in handling the nearly 400 "western pipe cases" assumed and discharged a burden of monumental proportion. It is not surprising that in the course of disposing of such a burden there should be a few casualties, and this case is one of them. Fortunately, it can still be saved.

Appellant requests that the order of dismissal and denial of Appellant's motion for leave to file a Second Amended Complaint in the action below (a copy of Appellant's proposed Second Amended Complaint is found at C. T. pages 3656-3669), for an order vacating or modifying the Protective Order re

Defendant's Documents dated December 30, 1966 so as to permit Perovich to have access to the documents produced by the defendants [C. T. 3654, line 11-13] and for the Court to reconsider and/or clarify its ruling of October 3, 1966 with respect to certain discovery matters and enter an order requiring United to answer Plaintiff's Revised Interrogatories Numbers 2(b) (2) and (3), 4(b) and (c), 5, 6, 10(b) and (c), 11(b) and (c), 12, 14(b) and (c), 15, 16, 21, 22, 23(b) and (c), 24, 25(b) and (c), 26, and 27(b) and (c), and produce the documents as requested in Plaintiffs' Revised Motion for Production of Documents, Items 11 through 16 [C. T. 3654, lines 14-21], be reversed and that the action below be remanded to the District Court for further proceedings.

Respectfully submitted,

McKENNA & FITTING
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Batris W. Perovich, dba
B. W. Perovich Construction Co.

NO. 22205

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BATRIS W. PEROVICH, dba B. W. PEROVICH CONSTRUCTION COMPANY,	)
Appellant,	)
vs.	)
PIPE LININGS, INC.,	)
Appellee	)

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

TABLE OF AUTHORITIES CITED

No. 22205

IN THE

UNITED STATES COURT OF APPEALS

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vs.	)
PIPE LININGS, INC., et al.	)
Appellees.	)

APPELLEE'S BRIEF

I

ISSUES

1. Did the District Court abuse its discretion in dismissing a case (a) where the plaintiffs deliberately disobeyed an order of the Court imposing sanctions for their untimely and sudden discharge of counsel -- an act which frustrated the pre-trial and trial schedule developed by the Court and counsel, and (b) where the plaintiffs, in addition, refused and failed to file a written trial brief by April 27, 1967, the fifth date set therefor by court order?

2. Did the District Court have the power to impose sanctions for an act disruptive of orderly pretrial proceedings which the Court concluded did not warrant dismissal?

3. May a plaintiff, by refusing to obey orders of the Court requiring payment of sanctions and timely preparation of a trial brief, gain quick review of collateral motions not otherwise subject to interlocutory appeal?

4. Did the District Court err in ruling as it did on the collateral motions which plaintiffs seek to appeal?

II

STATEMENT OF THE CASE

Federal Rule of Civil Procedure 41(b) provides in part as follows:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

On December 14, 1966 -- in a case which had been filed almost four years earlier -- appellant Batris W. Perovich suddenly discharged Mr. John Joseph Hall, Esquire, the second attorney to handle the case for him. [R.T. 12/30/66, p. 4, lines 13-17] At this time trial was scheduled for February 13, 1967. Plaintiffs' trial brief, which had to be filed before defendants could write a trial brief and submit motions for summary judgment, etc., was due by December 21, 1966 [R.T. 12/13/66, p. 56, lines 8-9] subject to a modest additional extension of time if required by Mr. Hall. [R.T. 1/17/67, p. 59, line 20 to p. 60, line 1] To permit plaintiffs to find new counsel Judge Pence rescheduled the date for filing the trial brief to January 13, 1967, even though this would probably mean that the trial could not be begun until late March of 1967. [R.T. 12/30/66, p. 16, lines 1-24]

By January 17 the plaintiffs had still not filed a trial brief, although under explicit order of the court to do so or face the possibility of dismissal. On that date, Mr. Perovich' third attorney assured the court that he would "proceed promptly" [R.T. 1/17/67, p. 8, lines 21-24], and estimated that ". . . it will take between sixty and ninety days for me to go through the files and digest the materials with sufficient thoroughness to enable me to file trial briefs in these matters and prepare for trial." [C.T. 3596, lines 20-22] Judge Pence did not dismiss the cases; instead, he ordered the plaintiffs to pay sanctions to the defendants for the time and effort they had unnecessarily devoted to the case as the result of plaintiffs' precipitous and disruptive discharge of former counsel. [R.T. 1/17/67, p. 174, lines 7-12] Plaintiffs were given until April 4, 1967 -- a period of 76 days -- to file their trial brief.

Appellant candidly admits that following the January 17 hearing "two alternatives were open to plaintiffs." [Appellant's Opening Brief, p. 47, lines 3-4] "The first was to . . . attempt to produce within the applicable time limit a trial brief;" in other words, to obey Pre-Trial Order No. 6. [Appellant's Brief, p. 47, lines 4, 8-9] But this would have entailed foregoing three motions plaintiffs wished to make.

As appellant put it, "The second alternative was to bring these matters before the District Court for adjudication, even though preparation of the appropriate motions would require such diversion of time away from the trial brief as to preclude filing it by April 4." [Appellant's Brief, p. 47, lines 15-18] [Emphasis added] Plaintiff chose to make those three motions

[Appellant's Brief, p. 47, lines 19-20] despite the fact that each had been previously heard by the court [R.T. 12/30/66, pp. 4-40; R.T. 10/3/66, pp. 32-57] or knowingly waived by the plaintiff. [C.T. 3768-3770; R.T. 10/3/66, p. 24, line 10 to p. 30, line 22; R.T. 10/3/66, p. 30, lines 9-20]

In addition, plaintiffs moved for almost five additional months, until September 1, 1967, to complete the trial brief. Although the court denied this motion for an extension, the court did extend the due date for the plaintiffs' trial brief to April 27, 1967 pending determination of plaintiffs' three substantive motions. [R.T. 3/18/67, p. 78, lines 10-13 and p. 80, lines 7-21] Being faced with writing a trial brief, plaintiff once again chose to do otherwise. Plaintiff was again "in a dilemma," as his counsel put it. "He could have dropped everything and devoted all remaining time in the preparation of what he felt, if the motions were denied, would be an inadequate trial brief and which he might not be able to finish on time . . . or he could devote his efforts to salvaging as much as possible through . . . settlements. There being only twenty-four hours in the day, he could not do both."

Appellant continues, "He chose the latter course, [again disobeying a pretrial order] and eventually succeeded in settling substantially all of the claims except those against United. Hence, while he was not working directly on the trial brief, he was working toward resolution of the cases." [Appellant's Brief, p. 49, lines 6-8, 11-17]

On April 7, the last date for payment of sanctions due appellee, plaintiffs' counsel informed defendant's counsel that plaintiffs had decided not to pay the sanctions. [C.T. 3896-3898] A few days later, plaintiffs defiantly gave notice that

they did not intend to pay the sanctions, and that they considered it"futile" to attempt to prepare the trial brief. [C.T. 3877, 3905] Not unexpectedly, the case was ordered dismissed on May 19, 1967. [C.T. 3954]

III

CHRONOLOGY

March 2, 1962 -- Defendants settled prior antitrust case brought by Mr. Perovich for $80,000, receiving a general release. [C.T. 978-979; Affidavit of John J. Hanson, Exhibit A]

March 11, 1963 -- Complaint filed on behalf of Perovich by Richard D. Barger, Esquire of Meserve, Mumper and Hughes [C.T. 2-14]

July 30, 1964 -- John Joseph Hall substituted as attorney for plaintiffs in place of Mr. Barger, who had been discharged. [C.T. 1426-1428]

October 28, 1965 -- Defendants urge trial date of June 20, 1966. [R.T. 10/28-29/65, p. 46, lines 17-18] At plaintiffs' request trial is set for January 30, 1967. [R.T. 10/28-29/65, p. 41, lines 12 to p. 45, line 22]

August 5, 1966 -- Plaintiffs urge January 30, 1967 trial date. Defendants want March. Court sets February 13, 1967. [R.T. 8/5/66, p. 19, line 6 to p. 20, line 8] Trial brief is set for November 28 at Mr. Hall's suggestion. [R.T. 8/5/66, p. 69, line 17 to p. 70, line 3]

October 3, 1966 -- Brief time is reset for December 15, 1966 to allow plaintiffs more discovery time. [R.T. 10/3/66, p. 85, lines 18-22]

December 13, 1966 -- Brief time again reset, this time for December 21, at plaintiffs' request and suggestion. [R.T.

12/13/66, p. 56, lines 8-9]

December 14, 1966 -- Perovich discharges Mr. Hall.

December 30, 1966 -- Brief time reset for January 13, 1967, on penalty of dismissal unless good cause is shown. [C.T. 4086, lines 9-15]

January 17, 1967 -- Mr. Weinstein of McKenna & Fitting appears for plaintiff. [R.T. 1/17/67, p. 4, lines 11-14] The court imposes sanctions. [R.T. 1/17/67, p. 174, lines 11-12]

January 18, 1967 -- Brief time reset for April 1, 1967 [R.T. 1/18/67, p. 9, lines 21-22], soon changed to April 4, 1967 [R.T. 1/18/67, p. 11, lines 5-7; C.T. 3598-3600], affording plaintiffs seventy-six days.

March 10, 1967 -- Plaintiff requests hearing on motion to continue the brief date to September 1, 1967 to allow hearing on three other motions.

March 18, 1967 -- Brief date postponed to April 27. [R.T. 3/18/67, p. 8, lines 7-21]

April 6, 1967 -- Hearing on the other three motions. Court approves various settlements between plaintiffs and various defendants. [R.T. 4/6/67, pp. 54-60]

April 11, 1967 -- Plaintiffs file "Notice of Refusal to Pay Sanctions" [C.T. 3877]

April 12, 1967 -- Defendants serve notice of motion for dismissal. [C.T. 3893-3900]

April 25, 1967 -- Plaintiff belatedly offers to pay sanctions, but only if granted an extension until June 15 to file the trial brief. [C.T. 3933-3936]

May 19, 1967 -- Judge Pence enters order dismissing Perovich cases with prejudice. [C.T. 3954]

DETAILED STATEMENT OF FACTS

This case was dismissed by Judge Pence for plaintiffs' defiant refusal -- not plaintiffs' inability -- to pay sanctions as ordered by the court, and plaintiffs' refusal and unjustified failure to file a trial brief on April 27, 1965, the sixth date set for such brief. Upon the plaintiffs' refusal, the trial court had no alternative but to dismiss the case. The conclusion that this was proper is strengthened by a review of the prior delays in the case and of the almost insuperable task facing the court in extracting a trial brief from plaintiffs.

A. EARLY DELAYS -- FOLLOWED BY TIGHT SCHEDULING.

The complaint in the action on appeal, Civil No. 63-278-MP was filed on March 11, 1963. The attorneys of record at that time were Meserve, Mumper & Hughes with Mr. Richard D. Barger signing the complaint. [C.T. 2-14] Later, Mr. Barger and the firm of Meserve, Mumper & Hughes were discharged as attorneys for the Perovich plaintiffs and John Joseph Hall was substituted in their place. [C.T. 1426-1428]

On January 6, 1965 the three Perovich cases,[1] along with all other pipe cases then pending in the Southern District, Central Division, were transferred to Judge Martin Pence for all further proceedings. [C.T. 1628] At a hearing on October 28, 1965, Judge Pence considered the complex problem of coordinating

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1. The action on appeal, and two companion suits, Northwest Pipe Linings, Inc. v. Pipe Linings, Inc. et al. and Inplace Linings v. Pipe Linings, Inc., et al., U.S.D.C., Southern District of California, Central Division (now Central District of California), Nos. 63-279 and 63-321, respectively, were generally referred to during the pendency of the proceedings as the "Perovich cases."

discovery in the many so-called End-User cases[2] and the No-Joint[3] and Perovich competitor cases, as well as the question of time and priorities between the Perovich and No-Joint cases for purposes of trial. For several reasons the defendants in the Perovich cases, most of whom were defendants in the other cases as well, urged that the Perovich case be tried first, commencing June 20, 1966. The Perovich cases were the first of the many pipe cases which had been filed; the issues and complexity of the Perovich cases were considerably less than the issues and complexity of the other cases; there was much more discovery required by the defendants in the No-Joint cases. [R.T. 10/28-29/65, p. 41, line 12 to p. 45, line 22]

Judge Pence's inclination was also to try the Perovich cases first [R.T. 10/28-29/65, p. 64, line 23 to p. 65, line 1], but Mr. Hall preferred that the No-Joint cases be tried in advance of the Perovich cases. [R.T. 10/28-29/65, p. 46, lines 12-18] Defendants' proposal would have afforded the Perovich plaintiffs a full nine months to prepare their cases. Yet Mr. Hall stated, "But to be realistic about this, I don't think that we could have our trial in June properly prepared." [R.T. 10/28-29/65, p. 46, lines 21-22] As a result, the court set the

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2. The End-User cases were a series of antitrust actions filed by more than three-hundred plaintiffs, mostly public entities, charging concrete and steel pipe manufacturers with violations of the antitrust laws. These cases were consolidated before Judge Pence for all proceedings. [C.T. 3960, lines 13-19] Many of the defendants in the Perovich cases, including United were also defendants in the End-User cases.

3. The No-Joint cases were several antitrust actions brought by several concerns promoting a novel method of manufacturing concrete pipe against many of the same concerns named as defendants in the Perovich cases.

No-Joint trial for June 1966 and pushed the Perovich trial back to January 30, 1967. [C.T. 2206-2211] Pretrial Order No. 2 suspended most discovery and other activity in the Perovich cases until after the conclusion of the No-Joint trial.

The No-Joint cases were settled by all parties before the June 20 trial date. Consequently, activity in the Perovich cases resumed somewhat earlier than anticipated by Pretrial Order No. 2. At the August 5, 1966 pretrial conference Mr. Hall urged the court to maintain the trial date of January 30, 1967. [R.T. 8/5/66, p. 19, line 20 to p. 20, line 8] In October 1965 plaintiffs had asserted that nine months did not afford them adequate time to prepare their cases for trial; yet in August 1966, Mr. Hall urged the Court to set the trial only six months later, even though there had been no discovery during the pendency of the No-Joint cases.

Defendants proposed a trial commencing in early March 1967. [R.T. 8/5/66, p. 19, lines 6-10] The court set the date for February 13. Plaintiffs agreed to file their detailed trial brief on or before November 28, 1966, a date suggested by Mr. Hall. [R.T. 8/5/66, p. 69, line 17 to p. 70, line 3]

The defendants undertook preparation of the pretrial order hammered out at the August 5 hearing. Even though copies of the proposed order were promptly sent to Mr. Hall, it was not until September 19, 1966, and then only in response to a letter from Mr. Josef Cooper, Administrative Assistant to Judge Pence, that Mr. Hall informed the court that the amount of time allowed for plaintiffs' discovery by Pretrial Order No. 4 was not adequate. [C.T. 3817-3819] The lateness of this letter prompted

Judge Pence to personally write Mr. Hall on September 21, 1966 to advise Mr. Hall that the court was disturbed that he had taken so long to set forth his position. A copy of said letter is attached to this Brief as Exhibit B.

At the hearing of October 3, 1966 Judge Pence granted plaintiffs additional time in which to conduct discovery, and further advised Mr. Hall to apply to the court if the additional time was not adequate. [R.T. 10/3/66, p. 85, lines 7-17] This of course meant that the date by which plaintiffs were to file their trial brief, previously set for November 28, also had to be extended. That date was set for December 15, 1966. [R.T. 10/3/66, p. 85, lines 18-22]

At plaintiffs' insistence the February 13 trial date was retained. Pretrial Order No. 4 set the following schedule. Discovery would be complete by December 7, 1966. On December 15 plaintiffs would file their trial brief. By December 22 defendants would file their contemplated motions for summary judgment. By December 28 the plaintiff would file an answering memorandum. Pretrial conference would be held on December 30, 1966. By January 6 defendants would file their detailed trial brief. By January 13, 1967 plaintiffs were to file their reply brief. Another pretrial conference was set for January 16 and 17, 1967. Other dates related to the designation of depositions and other documents for use at the trial. By February 1, 1967 each party was to file written briefs setting forth objections to deposition testimony and documentary evidence. By February 6 all parties were to file witness lists, proposed jury instructions and court papers. The final pretrial conference would be held February 8 and trial would begin February 13. [C.T. 3202-3209]

Under such telescoped scheduling, it is obvious what would be the result if there were further delays in the submission of plaintiffs' trial brief. Paragraph 13 of Pretrial Order No. 4 sets forth the requirements plaintiffs were to meet in filing their written brief:

> "13. On or before December 15, 1966 plaintiffs shall file a detailed written trial brief containing separately numbered paragraphs and setting forth:
>
> "a. The facts which each plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;
>
> "b. The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim and the party bearing the burden of proof on each issue. Plaintiff's contentions as to the measure of damages should include a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial."
>
> [C.T. 32-3-3204]

The timely filing of this trial brief was vital. Defendants contemplated motions for summary judgment could best be evaluated against plaintiffs' written trial brief, which was

to treat in detail the facts and contentions plaintiff intended to prove. Furthermore, defendants obviously could not write their trial brief until they had sufficient time to review and digest plaintiffs' brief. To the extent the time for filing plaintiffs' trial brief was delayed, it became more and more difficult to retain the February 13 trial date.

B. PLAINTIFF AGAIN HAS THE DATE FOR THE BRIEF POSTPONED.

The first postponement in the due date for the trial brief -- from November 28 to December 15 -- has already been described. At a hearing held on December 13, 1966 Mr. Hall indicated that, "he would need a few more days" to complete the plaintiffs' trial brief. The Court responded as follows:

> "THE COURT: How many days do you feel that you will need, because as soon as that takes place, then everything else starts blocking backwards from that. Now, do yourself a real analysis and come up with a realistic figure based upon your own estimate of what you feel that you need.
>
> "MR. HALL: December 21, the end of that day.
>
> * * * *
>
> "THE COURT: Okay. The 21st is the date you set for yourself, 4:30 p.m. on the 21st."
>
> [R.T. 12/13/66, p. 54, line 22 to p. 55, line 2 and p. 56, lines 8-9]

At the conclusion of the hearing on December 13, defense counsel were asked by Mr. Josef Cooper, Administrative Assistant to Judge Pence, to give Hall additional time to file

his trial brief, setting a date early in January if Hall desired additional time. Defense counsel understood that Mr. Hall had also been informed that he could request some additional time if necessary. [R.T. 1/17/67, p. 59, line 20 to p. 60, line 1; R.T. 3/18/67, p. 36, lines 13-20]

C. PLAINTIFF'S DISCHARGE OF HIS SECOND ATTORNEY FURTHER POSTPONES THE DUE DATE OF THE BRIEF.

On December 15 defense counsel met with Mr. Hall to reschedule the filing date for plaintiffs' trial brief, if necessary. At that conference Mr. Hall informed defendants that he had been discharged by Mr. Perovich as attorney in two of the cases. Mr. Hall so informed the court, saying that he probably would be discharged as counsel for the third plaintiff. [R.T. 12/30/66, p. 4, lines 13-17] In fact he was so discharged. [R.T. 12/30/66, p. 6 line 21 to p. 7, line 1]

At a hearing held on December 30, 1966, in view of the fifteen days that had been lost, defendants proposed that plaintiffs file their trial brief on or before January 13, 1967. [R.T. 12/30/66, p. 14, lines 5-16] This gave plaintiffs two full weeks -- a period of time in excess of the time Mr. Hall had on December 13, when he promised to file the trial brief by December 21. Defendants could only assume that the trial brief was nearly complete.

One of the reasons why it was particularly important that the Perovich cases adhere closely to the pretrial schedules established by court order was the fact that these cases were only one of many involving most of the same defendants. The burden on the court and defense counsel was particularly great because of the pendency of a contemplated series of many trials,

involving many of the same defendants, immediately after the Perovich trial. It was thus important that the Perovich cases not be delayed. When it became apparent during the December 30, 1966 hearing that the new date of January 13 for the filing of plaintiffs' trial brief would necessarily push the trial date back to late March 1967, neither defense counsel nor the court were pleased. [R.T. 12/30/66, p. 16, lines 1-24] Another hearing was scheduled for January 17, 1967. [R.T. 12/30/66, p. 32, lines 11-12]

D. PLAINTIFF'S THIRD ATTORNEY OBTAINS "GENEROUS" POSTPONEMENT.

By January 17 plaintiffs had not filed their trial brief, although under explicit order of court to do so or face the possibility of dismissal. At a hearing on that date Mr. Weinstein of the firm of McKenna & Fitting appeared on behalf of the Perovich plaintiffs. [R.T. 1/17/67, p. 4, lines 11-14] He explained that he had informed the plaintiffs that he would represent them only if the court granted him and his associates sufficient time to familiarize themselves with the files and prepare the case fully. [R.T. 1/17/67, p. 7, lines 5-11] Mr. Weinstein filed in open court his affidavit [R.T. 1/17/67, p. 7, lines 12-21] in which he stated under oath:

> "5. I anticipate that it will take between 60 and 90 days for me to go through the files and digest the materials with sufficient thoroughness to enable me to file trial briefs in these matters and prepare for trial."
>
> [C.T. 3596, lines 20-22]

Mr. Weinstein represented that he was "very aware of the burden that any lawyer takes when he comes into the middle of an antitrust case of this magnitude . . . ." [R.T. 1/17/67, p. 8, lines 4-6] He explained that he had told his clients that he did not believe the cases would be dismissed if the court "had some assurance that they intended to proceed promptly henceforth." [R.T. 1/17/67, p. 8, lines 21-24]

Later in the course of the same hearing Mr. Hall, former counsel for the Perovich plaintifs, testified that in his opinion it would take new counsel familiar with the antitrust laws about 40 working days to review and digest the files, and prepare the trial brief required by the pretrial order. [R.T. 1/17/67, p. 82, lines 13-24] (Mr. Weinstein's estimate was based on calendar days.) [R.T. 1/17/67, p. 175, line 5]

On the morning of the 18th plaintiffs' and defendants' counsel met to reschedule the already much delayed trial brief, but were unable to agree on the number of days that should be allotted to plaintiffs to file the brief. Defense counsel proposed twenty to thirty days and plaintiffs' counsel demanded ninety. [R.T. 1/18/67, p. 4, lines 1-6] Upon being told of the controversy, Judge Pence stated, "My sympathy is with Mr. Weinstein . . . ." [R.T. 1/18/67, p. 8, lines 21-22] At first the court gave plaintiffs until April 1 to file their trial brief, telling Mr. Weinstein, "If you want to undertake it in that length of time, it's yours. If you say you can't do it in that period it is not yours." [R.T. 1/18/67, p. 9, lines 21-24] Later during the same hearing, the court added three extra days making the filing time April 4. Thus the court afforded plaintiff seventy-six days or fifty-five workdays in which to complete their

trial brief -- a period of time fifteen days in excess of the time Mr. Hall had estimated under oath would be required to complete the brief. [R.T. 1/18/67, p. 11, lines 5-7]

Mr. Weinstein seemed to be perfectly happy with the new limit. "I think April 4 is acceptable, I think that is no problem." [R.T. 1/18/67, p. 11, lines 16-17] Later he underscored his opinion, "I think your Honor has been more than generous." [R.T. 1/18/67, p. 12, lines 13-14] He added that he would recommend to plaintiffs that they let him take the cases, and again reiterated, " . . . I think it is fair." [R.T. 1/18/67, p. 12, lines 18-20]

At this time there was some uncertainty as to when the Perovich cases could be tried, but the court made it clear that in any event it wanted to resolve the impending summary judgment motions by the first or middle of May 1967. [R.T. 1/18/67, p. 12, lines 9-12] The uncertainty as to trial date stemmed from a trial scheduled before Judge Pence in an unrelated matter. Since there is always a substantial possibility that any action might be settled before reaching the trial stages, it made sense in any event to proceed as rapidly as possible to prepare the Perovich cases for trial. That point was explicitly made by defense counsel. [R.T. 1/18/67, p. 12, lines 2-8]

Pretrial Order No. 6, which summarized the results of the January 18 hearing, required plaintiffs to file their brief by April 4, 1967 and required defendants to file their motions for summary judgment by April 18. [C.T. 3598-3600]

At the hearing on January 17, 1967, the court declined to dismiss the case but because counsel for the defendants had been "put through an enormous amount of time, trouble and effort

". . . ," primarily in preparing for two unnecessary hearings brought about by plaintiffs' untimely discharge of counsel, the court imposed sanctions upon plaintiffs. [R.T. 1/17/67, p. 174, lines 8-12]

E. RATHER THAN WRITE THE PRETRIAL BRIEF, PLAINTIFF CONCENTRATES HIS EFFORTS ON VARIOUS COLLATERAL MOTIONS PREVIOUSLY DETERMINED OR WAIVED; NEVERTHELESS PLAINTIFF WINS A FIFTH DELAY.

Appellant's Opening Brief admits that plaintiffs could have filed a trial brief by April 4. [p. 47, lines 16-18] "Undoubtedly this would have been the course of least resistance for plaintiffs' counsel." [p. 47, lines 9-10] Appellant's Brief does not point out, however, that each of the three motions on which plaintiffs deemed it wiser to spend his time had been rejected by the court or had been knowingly waived by prior counsel.

"On March 14 and 17, respectively, plaintiffs filed a complex of four (4) motions aggregating in excess of 100 pages." [Emphasis added] [Appellant's Opening Brief p. 47, lines 19-20] This was the result of the "diversion of time away from the trial brief . . . ." [p. 47, line 17] At a hearing held on March 18, 1967, plaintiffs moved to continue the April 4 trial brief date to September 1.

Plaintiffs' three motions (other than to extend the time for the trial brief) were as follows:

1. A motion for leave to amend the complaint to state a Sherman Act Section 2 charge;

2. A motion to modify the protective order regarding defendants' competitively sensitive documents; and

3. A motion to reconsider the court's prior ruling regarding the relevance of evidence of agreements affecting the

sale of concrete pipe.

Each of these motions which plaintiffs sought to raise, with the resulting delay in filing the trial brief, had been either considered and resolved by the court in the past or knowingly waived by plaintiffs. Plaintiffs were trying to justify a fifth extension of time for filing their trial brief because new counsel, brought in after the case was fully prepared, wanted to back up and redo the work of prior counsel.

Plaintiffs' proposed motion to amend to allege a violation of Section 2 of the Sherman Act had been contemplated by former counsel. On September 19, 1966, Mr. Hall in a letter to the court proposed that a hearing be held on October 18, the agenda to include, "Plaintiffs' Motion for Leave to File Supplemental and/or Amended Complaints." [C.T. 3768-3770] At a hearing held on October 3, 1966 Mr. Hall confirmed that it was his intention to amend the complaints to allege a Section 2 violation. [R.T. 10/3/66, p. 24, line 10 to p. 30, line 22] Because of the far-reaching implications of the proposed amendment, especially at such a late date in the cases, defense counsel advised the court of their intention to oppose any such amendments, and requested that the motions be made promptly. Mr. Hall said he would file them by October 12. [R.T. 10/3/66, p. 27, lines 3-5] When a question arose whether plaintiffs' proposed filing date of October 12 for their amended complaints and accompanying motions would afford defendants ample time to respond before the proposed October 17 or 18 hearing, the court, rather than impose a deadline, warned counsel for plaintiffs:

"THE COURT: Well, I will simply put it like this: I will let Mr. Hall go ahead and file

"that any time. Maybe it won't be heard on the 17th. Courts always take into consideration the matter of prejudice to the file date to opposing counsel, to every factor which involves prejudice to the orderly disposition of the case, prejudice to opposing parties in the process of the orderly disposition of the case.

"Now, with those Delphic words now in the record, Mr. Hall, you don't have to file it by the 10th or 12th or any other particular date. Whenever you get ready you file it."

[R.T. 10/3/66, p. 30, lines 9-20]

Mr. Hall never filed the proposed amended complaints. In view of the plaintiffs' conscious decision to abandon any attempt to amend their complaints to state a Section 2 charge, it is axiomatic that plaintiffs should not more than six months later, on the eve of the date for filing their trial brief, have been permitted to so amend their complaints, much less lean upon that intention as a reason to extend the time to file their already four-times delayed trial brief.

Plaintiffs' motion to modify the protective order regarding defendants' competitively sensitive documents merely revived a matter which had been fully considered at the hearing of December 13, 1966. [R.T. 12/13/66, pp. 4-45] The motion to reconsider the court's prior ruling regarding the relevance of evidence of agreements affecting the sale of concrete pipe concerned an issue which had been fully argued at a hearing on October 3, 1966. [R.T. 10/3/66, p. 32-57] Put simply, plaintiffs were attempting to justify another disruptive delay in the orderly

matters former counsel had argued and lost, or waived.

Plaintiffs had waited until March 10, less than a month before their trial brief was due, to inform the court and defendants that they wished to make these motions. Yet at least two of the motions had been contemplated by new counsel even before he undertook the Perovich representation. On January 13, 1967 Mr. Weinstein told Mr. Cooper that he might seek to undo certain prior rulings, specifically mentioning the protective order and the order relating to relevancy of concrete pipe agreements. [R.T. 1/17/67, p. 41, lines 17-20; C.T. 3760] If plaintiffs' counsel felt such motions were crucial, why were they not made at the outset of the seventy-six day period? Counsel's failure to promptly pursue motions he had contemplated making from the outset, was all the more reason why counsel's belated attempt to make such motions should not have postponed the due date for plaintiffs' trial brief.

In January, when Mr. Weinstein initially appeared in the cases, defense counsel apprised the Court that new counsel had indicated he might seek to reopen certain prior rulings of the court. Judge Pence stated as follows:

> "Counsel did this matter of reopening discovery. That's gone by the board. I am not going to start the pretrial of this case and all of the pretrial discovery all over again, with due regard to Mr. Weinstein, and what may be his necessities."
>
> [R.T. 1/17/67, p. 176, lines 17-21]

Yet the court, in order to be absolutely fair to the plaintiffs, set April 6, 1967 as a date to hear these motions. [R.T. 3/18/67, p. 77, line 24 to p. 78, line 7] At that time,

motions, the court made its Koufax analogy [R.T. 3/18/67, p. 79, line 22 to p. 80, line 2] and since a possible favorable response to plaintiffs' motions would necessarily result in a postponement of the time for the trial brief, the court extended the due date -- for the fifth time -- to April 27, 1967. [R.T. 3/18/67, p. 80, lines 20-21].

At the same time the court set April 6 as the due date for the payment of sanctions. [R.T. 3/18/67, p. 83, lines 4-6].

Plaintiffs' moving papers were devoid of any showing of good cause, disregarding their three proposed motions, why the trial brief should not have been prepared by April 4, 1967, nor did counsel represent that he would have been unable to file the trial brief by this date if he had been compelled to do so. In fact there was no reason why the brief should not have been completed by April 4. The voluminous files plaintiff now hides behind were an illusion. They were stuffed with old motions to compel attendance of witnesses, abortive motions by plaintiffs for sanctions, four-year-old motions to stay discovery pending the grand jury investigation, motions to unseal the Government's sentencing memorandum in criminal cases, etc. Such moot disputes constituted the overwhelming bulk of the court files in these cases. They needed to be read only once, briefly (if at all), and disregarded.

Moreover, by virtue of Mr. Weinstein's extensive anti-trust experience, he should have been eminently qualified to cut through the chaff to the grain of the case. [C.T. 3642-3643] In fact if counsel for plaintiffs was finding it difficult at that time to prepare the trial brief, it was because inadequate time had been devoted to the project. At the time plaintiffs' motion to continue the trial brief was filed, Mr. Weinstein had devoted

only 160 hours to the Perovich cases. This certainly did not rise to the level of the prodigious effort defendants and the court had every right to expect. [C.T. 3644] Although Mr. Weinstein, according to his own affidavit, had worked a portion of every weekend since January 10, he had averaged only two and a half hours per day on the Perovich cases. Obviously a large portion of that time was spent appearing in court all day on January 17, meeting with defense counsel and appearing in court on January 18, and preparing a motion for an extension of time as well as preparing the other three motions plaintiffs filed before the March 18 hearing. Perhaps it was indicative of the extent of new counsel's effort that not until March 16 had he visited defendants' document depository, where the documents produced for plaintiffs were located, and even then he stayed for only forty-five minutes. [C.T. 3763]

The prejudicial effect which the delay until September 1967 would have had on defendants was very real. The expense in attorneys' fees and defendants' time to refamiliarize counsel and witnesses with the factual matters at issue in the actions would have been substantial if the cases had been suspended for another five months. Counsel was then reasonably acquainted with the depositions and other discovery and could not have been expected to have retained close working knowledge of the cases during the proposed five-month hiatus.

Defendants' attorney fees would not have been the only cost to defendants of further delay. The many key representatives of defendants who would have been witnesses at trial were then familiar with the facts, which dated back to the early 1960's. They had been deposed at length during October and November 1966

and in that connection had conferred with counsel and reviewed facts and records. The benefit of this substantial preparation would have been almost totally dissipated if another five-month delay had been grafted onto the already delayed progress of the cases. Instead, these many witnesses, after a span of five months, would have had to dedicate great slices of their time to review facts and duplicate work now reasonably fresh in their minds. The witnesses who would have had to review prior testimony and spend large amounts of time with counsel were not low-level employees but rather the presidents of two corporate defendants and a score of vice presidents, executives and manager [R.T. 3/18/67, p. 53, line 13 to p. 54, line 24] The impact of the requested extension upon the corporate and management personnel of the six defendants, although incalculable in dollars and cents, would have been very real and very prejudicial.

These factors were recognized by Judge Pence, who agreed that the delay had prejudiced the orderly and proper disposition of the cases. He further recognized the prejudicial effect of such delays upon defendants.

> "I find that the delay which has taken place has certainly prejudiced the orderly and proper disposition of these cases. The statements made by Mr. Cooper regarding the preparation of clients and the preparation of counsel for trial, the statements made that demand a complete review of all that has been done, even now, because of the delay that has taken place, all of those are very real and very true and are prejudicial because somebody pays the bill because every time you read

"a document or review your notes, you use that much time out of your life simply to make sure that you have properly refreshed your mind."

[R.T. 3/18/67, p. 78, lines 14-25]

F. UPON LOSING HIS THREE MOTIONS, PLAINTIFF REFUSES TO PAY SANCTIONS OR PROCEED FURTHER WITH THE CASE, DEMANDING INSTEAD HIS APPELLATE REMEDY.

On April 6, 1967 plaintiffs' three motions were denied. At this point Mr. Weinstein asked for an additional day in order to decide whether plaintiffs would pay sanctions "I would like to consult with Mr. Brown and at least have the ability to make a telephone call to my client this evening, in light of the changing posture of number two motion, in order to decide what he wants to do, and frankly, whether he is in a position to pay those sanctions. We have made preparations, too, for us to pay them in the event it is necessary to the case." [Emphasis added] [R.T. 4/6/67, p. 50, lines 2-8] afternoon session

Mr. Weinstein made the plaintiffs' position quite clear, as follows:

" . . . it deals with the possibility that Davin and Perovich and their attorneys concluded that we, perhaps in our erroneous judgment, but our judgment nonetheless, honestly believe that your Honor's rulings of today are of such a nature as to completely hamstring us. I will be frank in telling you that we have seriously considered not paying the sanctions to Mr. Cooper, hoping that we might be able to convince the Ninth Circuit Court of Appeals that the sanctions were improperly imposed. And that together

"with certain other rulings, together with the ruling with the time of the briefs imposed such a tremendous burden on us that it was not fair to ask Mr. Perovich and Davin to continue to incur this tremendous legal expense necessary to create this brief, which we believe in our judgment that the rulings prevented from being a brief which will be enough to win a case."

[R.T. 4/6/67, p. 51, lines 1-15] (Afternoon session)

At this point Mr. Weinstein in effect asked the court to say that if plaintiffs did not pay the sanctions then the case would be dismissed promptly so that Mr. Cooper would not be in a position of arguing that the case was also dismissed for failure to file the trial brief. [R.T. 4/6/67, p. 51, lines 16-24] (Afternoo session) The court declined to give Mr. Weinstein any such assurances:

"And I will until the case is at a definite posture, not only one leg, but two, the second leg. This can, if at this time I should dismiss, be reversed for imposing a sanction or dismissal for failing to say [sic] $600. The ultimate result would be if I were reversed that you would have had how much time?

"MR. WEINSTEIN: I don't know what the backlog is on the Ninth Circuit, your Honor.

"THE COURT: Let's call it six months.

"MR. WEINSTEIN: All right.

"THE COURT: So that you would have gained over six months and the risk of dismissal for $600 is

"one of these calculated risks. * * *"

[R.T. 4/6/67, p. 53, lines 8-20] afternoon session

On that same day, April 6, 1967, at approximately 4:15 p.m., the law firm of McKenna & Fitting delivered a check drawn on its account in favor of Gibson, Dunn & Crutcher in the amount of $656.15, the amount of the sanctions due United. [C.T. 3899] Later that same day Mr. Weinstein personally informed Robert Cooper that his firm had sent a check to Gibson, Dunn & Crutcher that afternoon in the amount of the sanctions due United. Mr. Weinstein requested Mr. Cooper not to negotiate the check, rather to hold it until Mr. Weinstein advised Mr. Cooper whether to cash it as payment of the sanctions due or to return it to Mr. Weinstein. In explanation, Mr. Weinstein said only that his clients had not yet decided whether or not they intended to pay the sanctions. [C.T. 3896-3898]

On the afternoon of April 7, the day the sanctions were due, Mr. Weinstein advised Mr. Cooper that he had talked to his clients and it was their decision not to pay the sanctions. Accordingly, he requested Mr. Cooper to return the check to McKenna & Fitting, and the check was returned on that date. [C.T. 3896-3898]

Within a few days, on April 11, plaintiffs filed an unusual document boldly entitled, "Notice of Refusal to Pay Sanctions." In that document, plaintiffs formally advised the Court that they had refused to pay the sanctions due United for three stated reasons:

"1. The order requiring the plaintiffs to pay sanctions exceeded the power of the Court;

"2. The plaintiffs were financially unable

"to pay the sanctions within the time ordered;

3. The orders of the Court setting the time for preparation of trial briefs, denying the plaintiffs personal access to the documents produced by the defendants, and limiting discovery into evidence of conspiracy as it affected the current [sic] pipe industry so hampered the preparation of the plaintiffs for trial that it would have been a futile effort to pay said sanctions in order to avoid dismissal."

[C.T. 3877]

The third reason was obviously plaintiffs' real one. The validity of the first reason will be discussed infra, in Part V-B. Plaintiffs' alleged financial inability to pay sanctions will be discussed later in this Part, but suffice it to say here that on April 6 plaintiff did not ask the court to grant more time in which to raise money to pay the sanctions even though on that very day the court approved settlements involving the payment of large sums of money to plaintiffs. [R.T. 4/6/67, pp. 54-60] Plaintiffs' third reason for not paying sanctions was plaintiffs' disagreement with the court's ruling on other motions. Plaintiff's language indicated that the plaintiffs had no intention of filing a trial brief and proceeding further with the case.

On April 12, 1967 defendant United served a Notice of Motion and Motion for Dismissal with Prejudice of the Perovich actions on the grounds that (1) plaintiffs had refused to pay the sanctions, (2) plaintiffs were unwilling to prosecute the cases in accordance with existing time schedules and other orders of the court, and (3) plaintiffs had formally advised the court

in their Notice of Refusal to Pay Sanctions that they would not file their trial brief on or before April 27. [C.T. 3893-3900]

In a document filed April 19, 1967, plaintiffs responded to United's motion for dismissal. In that document plaintiffs set forth in undisputedly clear terms their reasons for refusing to pay the sanctions:

> "The plaintiffs reasons for not paying the sanctions were set forth in the Notice of Refusal to Pay Sanctions. Basically, the plaintiffs' position is, as was expressed to the Court, a desire to seek their appellate remedy with regard to the imposition of sanctions and the other rulings of the Court concerning the enlargement of time to file a brief, the scope of the Court's protective order, the ruling with regard to the amendment of the pleadings and certain discovery matters. The plaintiffs believed that the circumstances were such that the payment of sanctions would have been a futile act since the Court has made clear that it would dismiss the three plaintiffs' cases unless a trial brief was filed on April 27, 1967. Because of the plaintiffs' financial positions, and their belief that the rulings of the Court were incorrect, they desire to seek their relief in the appellate court rather than engage in what they believe to be the futile act of trying to prepare a brief hampered by the limitations on discovery, limitations on access to documents and the limitations of time concerning the preparation of that trial brief.
>
> " * * * The plaintiffs' desire to avoid

"incurring the necessarily large expense involved in preparing a less than complete pre-trial brief prior to a resolution of these appeals since they are of the view that the rulings made by the Court have already impaired their ability to fully and adequately present their cases in a trial brief."

[C.T. 3905-3906]

In plaintiffs' response filed April 19, 1967, plaintiffs did not take the position that they were unable to pay the sanctions. In the affidavit of Mr. Brown, counsel for plaintiffs, Mr. Brown stated only that on or about April 4 and 5, two or three days prior to the date for payment of the sanctions, that counsel had communicated with both Mr. Perovich and Mr. Davin and inquired whether they were financially able to pay the sanctions. According to Mr. Brown, at that time, each responded that they were not financially able to do so. [C.T. 3907] It was only later, in a document filed April 25, 1967, that plaintiffs took the position that on April 7, 1967, they did not have the funds available to pay the sanctions. In that document, plaintiffs stated that on April 7 "settlements were in midstream with respect to certain other defendants which settlements were thereafter to generate sufficient cash to pay the sanctions." At no time did plaintiffs set forth in an affidavit or otherwise the amount of the funds which were generated by the settlements, or the dates when the checks from defendants Centriline and American were received and/or negotiated.

To some extent defendant United is in the dark with respect to plaintiffs' financial ability to raise the small sum due United as of April 7 on the basis of their own assets or

funds, although plaintiffs' contention that they lacked the funds seems incredible. Mr. Davin, the proprietor of Inplace Linings Incorporated, at that time owned and operated a two-engine airplane and lived on a tree—lined estate overlooking a lake. Similarly Mr. Perovich received a substantial annual income from certain gravel pit operations and owned a substantial equity in a luxury home in San Marino, California. These two points were made in Defendants' Memorandum in Opposition to Plaintiffs' Memorandum re Payment of Sanctions and Filing of Trial Brief, filed on April 28, 1967, and they were not disputed by plaintiffs. [C.T. 3942-3943] In addition, Mr. Perovich had received $80,000 paid by some of the same defendants in the action in March 1962 in connection with the settlement of an earlier, similar anti-trust action. [Affidavit of John J. Hanson, Exhibit A]

Furthermore, appellant's contention that he was without funds on April 7, and similar contentions as to the amounts that he had spent prosecuting the case [Appellant's Opening Brief, p. 34, line 26], should be taken with a healthy dose of salt in light of Mr. Perovich's history of making false and incredible statements. The best example of this is contained in Perovich v. Glens Falls Insurance Company (9th Cir. 1968) 401 F.2d 145, another action involving Mr. Perovich. Key passages from the opinion follow:

> "In 1961, Glens Falls Insurance Company paid Batris W. Perovich $10,268.35 to compensate him for the theft of equipment insured by Glens Falls. Glens Falls later discovered that Perovich had made numerous material misrepresentations of the value of the stolen goods. Under the terms of the insurance contract, these

"misrepresentations voided the contract, and Glens Falls sued for a refund. Perovich appeals from the judgment entered on the jury's verdict for Glens Falls.

"Perovich first contends that there was insufficient evidence that he misrepresented value. There is no merit in this contention. The evidence shows that one man who worked four hours and used materials which cost less than $200 made equipment which Perovich valued at $1,100.00. Perovich's original estimate for the entire loss was $3,500.00. Even though Perovich subsequently told a deputy sheriff that much of the equipment had been recovered, his final claim exceeded $10,000.00

* * * *

"Perovich's next contention that the verdict is not supported by the evidence is an afterthought. The verdict is supported by ample evidence. Perovich grossly overvalued the equipment he owned. Several of his employees testified that he did not own as much equipment as he claimed was stolen. Other evidence shows that Perovich's 'partner' owned some of the equipment and that it was not stolen."

Perovich v. Glens Falls Insurance Company

(9th Cir. 1968) 401 F.2d 145, 146-147

An example of an incredible piece of testimony by Mr. Perovich is contained in his deposition of December 2, 1966. (page 594, line 21 to page 603, line 8) When asked if he had any other complaints against defendants, Mr. Perovich complained of

an attack on his person which he thought defendants may possibly have been responsible for. He testified substantially as follows: I had just stepped out of the Pen & Quill Restaurant at Sixth and Flower in Los Angeles when three men jumped me. One of them said, "There he is." I gave the first one a straight karate jab to the throat, and he fell to his knee, clutching his throat. I snapped the kneecap of the second man with my foot. I dislocated the left shoulder of the third man. The three men were all over six feet, all weighed around 200 lbs. I had seen none of them before and haven't since, and it all happened so quickly that I had no opportunity to look closely at them. They appeared to me to be men who worked around steel, in foundries, or perhaps in construction. I don't remember if they carried weapons. I didn't call the police or an ambulance, just walked back into the restaurant for a double shot of Scotch. I was concerned that I might have seriously injured the man who was clutching his throat, but when I left the restaurant the men were gone. I didn't tell the bartender about the encounter, and don't know of any witnesses; someone should have heard the shouting. No one was with me when I was attacked. I didn't suffer a scratch, but my back, on which I'd had an operation two or three months earlier, gave me a little pain. All I heard them say was "There he is," and of course one fellow howled with pain -- the one whose kneecap I snapped. I don't know if anyone called an ambulance. I waited around, thinking the police would have been called because of the man's screaming but they didn't come.

Still another example is contained in the deposition of September 22 and 23, 1966:

"Q Now, you have testified that you still have three centrifugal lining machines plus possibly some scattered parts of a prototype. Where do you keep these three centrifugal lining machines that we have referred to?

"A Next to my 30-30 rifle.

"Q Where do you keep your 30-30 rifle?

"A Next to the machines, in my bedroom.

"Q The machines are in your bedroom?

"A Yes, they are, sir.

"Q All three of them?

"A All three of them.

* * * *

"Q Now, you have three machines in your bedroom, as I understand your testimony. How large are these machines? Can you describe the dimensions for us?

"A No.

"Q You have no idea of the dimensions of the machines?

"A Well, I don't know if they are all there or not. I was thinking about that just out here in the hall.

"MR. HALL: He was asking you what size they are, in terms of inches or feet.

"THE WITNESS: I know, but I haven't looked in there for some time. I don't recall.

"Q BY MR. COOPER: Your testimony is that you haven't looked in your bedroom for some time?

"A I have them in a closet in my bedroom.

"Q And all three of them fit into a closet?

"A What I have in there is fitting in there. It is in there.

"Q And there are three in there, you think?

"A Well, I think so. It may be. It may not be. I don't know. They are in --

"Q Could the machines be anywhere else?

"A Possibly.

"Q Where else could they be?

"A I don't know at this time.

"Q Where is your 30-30?

"A That is right next to my left hand, sir.

"Q You don't keep it in the closet?

"A It is in -- it is right in the closet.

"Q You are sure that is there?

"A Yes, sir. I check that periodically.

"Q And of course in checking that periodically you haven't observed how many machines you have got in the closet, though; is that correct?

"A I think there is something covered over them.

"Q What sort of something is it?

"A Oh, probably my bathrobe or something."

[Perovich Deposition 9/22-23/66, pp. 534-538]

It is, however, unnecessary to even explore the question of plaintiffs' ability to raise the amount due United prior to April 7 on the basis of their own assets or credit, for it is uncontroverted that plaintiffs received a check on the morning

of April 5, 1967 from defendants American and Pipe Linings, Inc. in an amount far in excess of the sum due United, an amount which United understands was approximately $10,000. Thus, on April 5, plaintiffs knew that they had or would have as soon as they cashed the check, more than enough money to reimburse United for its expenses. Furthermore, as of the hearing on April 6, when the settlement with Centriline was approved by Judge Pence, plaintiffs knew they had another sum forthcoming, which defendant United believes was an amount similar to the amount paid by American and Pipe Linings. These very points were made by United in its Memorandum filed April 28 and were not denied by plaintiffs. [C.T. 3943]

More direct evidence that there were funds on hand that could have been used to pay the sanctions is contained in two documents filed by Batris W. Perovich before the Court of Appeals, Ninth Circuit, in this very action. The first of these documents was a petition to the court to set aside its order allowing appellant's counsel to withdraw. An attached affidavit by Mr. Perovic stated that, "with respect to sanctions, on the date when said sanctions were due, April 7, 1967, there were ample funds belonging to appellant to pay such sanctions, and appellant urged his counsel to make said payment and meet the Court's demand." [pp. 4-5] In a further document entitled, "Appellant's Reply to Counsel's Opposition to Appellant's Original Petition; Motion and Affidavit" dated April 23, 1968, Perovich reaffirmed his position that funds were on hand which could have been used to pay the sanctions. In addition he included a letter on the letterhead of McKenna & Fitting written by W. Z. Jefferson Brown and dated April 5, 1967. This letter, addres to Mr. Davin, enclosed a check for $10,000 made payable to Inplace

Linings Incorporated, Northwest Pipe Linings, Batris W. Perovich and McKenna & Fitting jointly. That Mr. Perovich is telling the truth in this instance is demonstrated not only by the letter over the signature of Mr. Brown, but by Mr. Weinstein's statement on April 6 that his clients would probably accept his judgment as to whether or not sanctions should be paid. [R.T. 4/6/67, p. 52, lines 20-21]

A document plaintiffs filed on April 25, 1967, inauspiciously entitled, Plaintiffs' Memorandum Re Payment of Sanctions and Filing of Trial Brief, contained a "modest" proposal. In that document, plaintiffs acknowledged that they then had the funds with which to pay the sanctions due United. Plaintiffs offered to pay them in the event the court would permit them to be paid, although the deadline of April 7 had long since passed. In that document plaintiffs linked their tardy tender of the sanctions with an extension of time in which to file the required trial brief until June 15, 1967 -- which would have been the sixth postponement of that date. Plaintiffs argued that the settlements and dismissals of the cases against all defendants except United, and the pending settlement between plaintiff Inplace Linings Incorporated and United had so reduced the burden of preparing the trial brief that plaintiffs could file the brief by June 15, 1967. [C.T. 3933-3938]

The difficulty with plaintiffs' reasoning was that if the dismissal of the cases against all defendants except United in fact would have reduced the plaintiffs' burden so considerably then why were United's expenses not paid on April 7 or promptly thereafter? Considerably prior to April 7, settlements with defendants Martin-Marietta and American Vitrified Products Company

had been affected. Settlements with the other three remaining defendants, American Pipe, Pipe Linings and Centriline were negotiated before the hearing on April 6 and approved at that hearing. Therefore with the exception of the then pending settlement between Inplace Linings and United, plaintiffs knew prior to the time they were supposed to reimburse United that their burden on the trial brief would be reduced.

In any event plaintiffs' current offer to reimburse United for its expenses was connected with plaintiffs' request for another extension of time to file their trial brief. Yet there was absolutely no showing of good cause why this extension should have been granted. Instead, the memorandum demonstrated further reason why the brief should have been filed April 27. Plaintiffs' memorandum on its face illustrated that plaintiffs felt their burden was reduced by reason of various settlements, all but one of which had been negotiated before April 6. Thus plaintiffs had known before the deadline for reimbursing United that the burden of preparing their trial brief had been reduced. Under those circumstances plaintiffs should have proceeded to prepare the trial brief and file it by April 27 as required by court order rather than to deliberately refuse to reimburse United and seek dismissal of their cases.

The prejudicial effect on United of plaintiffs' about face is clear. United's counsel had halted all work and progress on preparation of United's summary judgment motion and its trial brief as of April 7. Thereafter, substantial time was devoted instead to preparing defendants' motion to dismiss the Perovich cases for failure to reimburse United; and in that connection a substantial effort was devoted to a review of the law and facts

pertinent to the appeal plaintiffs claimed they would take from the court's dismissal. Then after time had been devoted to the above projects, which plaintiff deliberately invited, they sought to reverse direction again and undo their prior decision, to United's prejudice.

Plaintiffs' untimely tender of $656.15, tied as it was to an almost two-month extension in the date for filing plaintiffs' trial brief, was no more than a ploy to make their contumacious refusal to obey the Court's order regarding reimbursement of United Concrete "look better" on appeal. [C.T. 3945] In view of plaintiffs often repeated statements about seeking appellant review, it appears that their untimely offer to pay the sanctions -- late -- and to file the trial brief -- also late -- was merely an effort to make the trial court's dismissal of their action appear to be unreasonable.

On May 19, 1967 Judge Pence entered an order dismissing the Perovich cases with prejudice. Judge Pence had no reasonable alternative, in view of the plaintiffs' open refusal to pay sanctions when due and their failure to obey the court's order as to filing a trial brief. The court's Memorandum and Order of Dismissal followed on May 25, 1967. [C.T. 3954, 3957-3974]

V

ARGUMENT

A trial court judge has ample authority to dismiss a case when his orders are not obeyed. In the Perovich case two of Judge Pence's orders were deliberately disobeyed: The order to pay sanctions and the order to file a trial brief. In addition, there was a history of delay in the case, particularly in

in relation to the filing of the trial brief -- for which six separate dates had been set. Plaintiffs' refusal to pay sanctions was not due to financial inability; plaintiffs refused to pay because they disagreed with the court's ruling on various motions irrelevant to the payment of sanctions, and wished to pursue an appellate remedy. Likewise, as plaintiff admits in his appeal brief, plaintiffs' refusal to file a trial brief by the deadline date resulted from plaintiffs' conscious choice to concentrate their efforts first on the preparation of various motions already considered and second, on settlement of the cases. Plaintiffs consciously put Judge Pence in a situation where the alternative to dismissal of the case was to reward the plaintiffs for their willful refusal to obey his orders.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING A CASE IN WHICH THE PLAINTIFFS FAILED TO COMPLY WITH COURT ORDERS AWARDING SANCTIONS AND SETTING A DEADLINE FOR FILING A WRITTEN TRIAL BRIEF.

A federal court may dismiss an action for failure of the plaintiffs to prosecute or to comply with orders of the court. [Federal Rule of Civil Procedure 41(b)]

1. A Trial Court's Dismissal for Failure to Comply With Orders of the Court or for Failure to Prosecute Will be Reversed Only if the Court has Abused its Discretion.

Illustrating this rule is Link v. Wabash Railroad Company (1962) 370 U.S. 626, the leading Supreme Court case on the subject. There plaintiff's attorney did not attend a pretrial conference, because he was preparing papers to file with the Indiana Supreme Court. He so informed defendant's attorney and telephoned the courthouse to give them the same information.

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted.

* * * *

"On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion."

Link v. Wabash Railroad Company, 370 U.S. 626, 629, 633

Thus the Supreme Court recognized that the standard of appellate review is abuse of discretion.

The Ninth Circuit applied the abuse test in Russell v. Cunningham (9th Cir. 1956) 233 F.2d 806, stating that there will be no reversal on a dismissal for failure to prosecute in the absence of gross abuse of discretion.

"This court will not reverse the dismissal for lack of prosecution unless there has been a gross abuse of discretion. United States v. Pacific Fruit & Produce Co., 9 Cir., 1943, 138 F.2d 367."

Russell v. Cunningham (9th Cir. 1956), 233 F.2d 806, 808

See also Pearson v. Dennison (9th Cir. 1965) 353 F.2d 24 and Boling v. United States (9th Cir. 1956) 231 F.2d 926 (emphasizing the problem of crowded dockets).

Nor must prejudice be shown to justify dismissal. Pearson v. Dennison (9th Cir. 1965) 353 F.2d 24. Prejudice is

presumed from unreasonable delay. Hicks v. Bekins Moving and Storage Co. (9th Cir. 1940) 115 F.2d 406.

2. Dismissal Has Been Upheld on Appeal in Many Cases in Which Plaintiff's Conduct Has Been Similar to or, Indeed, Far Less Disruptive than that of Perovich.

There are a number of cases closely resembling the Perovich case in which the trial court has dismissed an action, and those dismissals have been uniformly upheld on appeal. Bearing a striking resemblance to the current Perovich action -- though involving general mortgage bonds, not antitrust allegations -- is Grunewald v. Missouri Pacific Railroad (8th Cir. 1964) 331 F.2d 983. In Grunewald the action was filed in February 1962. After the trial date was reset four times -- once over plaintiff's opposition, once on the court's own motion, and twice by agreement or leave and consent -- the case was dismissed in September 1963.

In February 1963 plaintiff's then attorney had withdrawn from the case. In June the plaintiff wrote the court a letter mentioning the death of a daughter, the burden on plaintiff's estate for the care of the daughter's three orphans, plaintiff's illness, plaintiff's inability to be ready for trial on July 8 and the illness of several necessary witnesses. Plaintiff asked for a ninety-day continuance. After an exchange of letters, a new attorney said, on July 5, that plaintiff had come to his office on the previous day. He said he would represent plaintiff if he could be given until August 8. The court then reset the case for September 4, giving plaintiff's new attorney more than the time he requested.

In a letter to the court dated August 31 plaintiff's new attorney withdrew from the case. On September 3 a third attorney telegraphed the court saying he would represent plaintiff if the case were continued. Thus the third attorney was in a position comparable to that of Mr. Weinstein in January 1967.

In Grunewald the trial court dismissed and the Court of Appeals affirmed. After stating that a federal court may dismiss a case for want of prosecution, and that such dismissal is a matter of discretion, not reversible in the absence of abuse, the court stated the applicable principle:

> "It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. * * * Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated."
>
> Grunewald v. Missouri Pacific Railroad
> (8th Cir. 1964) 331 F.2d 983, 985-986

The court summarized plaintiff's arguments but failed to find abuse of discretion.

> "We turn back to the facts and the chronology of this case. One, of course, can say, as the plaintiff does, that she has not had her day in court; that, while there were no less than four continuances, at lease the docket entries indicate that these were not made upon her sole request or granted over opposition; that the plaintiff has had misfortune in her family;

"that her last and non-local attorney withdrew on the eve of trial and without leave of court; and that she and her new counsel should not be penalized for all this.

"The standard we must apply, however, as indicated above, is not what we as individual judges might have done under the circumstances, but whether the district court's action was an abuse of its discretion. We cannot so conclude."

Grunewald v. Missouri Pacific Railroad

(8th Cir. 1964) 331 F.2d 983, 986-987

The court pointed out that the case had been at issue for seventeen months and said that the mere fact of withdrawal of counsel, unexplained, does not necessarily justify a continuance. This is because under a contrary rule a party could successfully obtain a continuance by discharging his counsel or inducing him to file a Notice of Withdrawal.

The parallels between Grunewald and Perovich are very strong. Most of the differences which do exist make Perovich the stronger case for dismissal. In Grunewald, for example, the dismissal came as the third counsel was just entering the case. Here, the third counsel was himself given several months in which to prepare a trial brief. Here also, we do not have merely the unexplained withdrawal of counsel -- we have the plaintiff's dismissal of counsel. In addition Grunewald involved much less elapsed time, and the continuances granted there were never at plaintiff's sole request; indeed, one extension in Grunewald was granted over plaintiff's objections. Here, the five extensions of time for filing plaintiffs' trial brief were all granted at

his attorney's request, after they had demanded an early trial date.

Another case bearing strong resemblances to the Perovich action is Refior v. Lansing Drop Forge (6th Cir. 1942) 124 F.2d 440. Plaintiff filed an action against majority stockholders in a corporation on September 10, 1935. When his original attorneys objected that their fees had not been paid, plaintiff substituted attorneys. After many maneuverings, during the course of which plaintiff failed to show up before a master, the case came on for hearing almost six years after filing. At that point appellant's new local counsel withdrew from the case and appellant's nonresident counsel moved for a continuance. The court ordered a continuance for one week upon the payment by plaintiffs of $100 in costs. Plaintiff refused to pay, or to proceed with the trial of the cause within one week, so the case was dismissed.

Upholding the dismissal the Court of Appeals stated:

> "Parties to litigation are entitled to its prosecution with reasonable diligence. Where prejudice results to one party by failure on the part of the party on whom rests the burden of going forward with a cause within a reasonable time to bring about its determination, the injured party has the right to move for dismissal. Actual injury may either be shown or inferred from the lapse of time if the lapse be great.
>
> "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power

to apply the penalty of dismissal.

Refior v. Lansing Drop Forge (6th Cir.1942) 124 F.2d 440

One of the aggravating features of Perovich's blatant refusal to obey the trial court's orders is that the refusal came only after the court denied several motions made by plaintiffs. Dissatisfaction with the results led plaintiff to decline to resume work on the case. Two cases have affirmed dismissals in remarkably similar circumstances. In Hooper v. Chrysler Motors Corporation (5th Cir.1963) 325 F.2d 321, cert denied 377 U.S. 967, a dismissal with prejudice was upheld after the plaintiff declined to go to trial after denial of his motion for a continuance. Similarly, in Blue Mountain Construction Company v. Werner (9th Cir.1959) 270 F.2d 305, cert denied 361 U.S. 931, dismissal was upheld when plaintiff declined to proceed further after losing his motion to dismiss without prejudice. The appellate court therefore held that a dismissal with prejudice for lack of prosecution was justified. (In addition, plaintiff had not shown up at a pretrial conference set by the court, but dismissal was upheld even absent plaintiff's "positive defiance" of the order of the court "setting the pretrial conference.")

Another aggravating factor justifying dismissal of the Perovich case was that plaintiff's refusal to pay sanctions and to proceed with the trial brief was made deliberately. In O'Brien v. Sinatra (9th Cir. 1963) 315 F.2d 637, upholding a dismissal under Rule 41, one of the major factors influencing the court was that plaintiff's failure to amend as ordered by the court was not inadvertent, but deliberate. That plaintiff's refusal here was deliberate is evidenced by their statements in court on April 6, their Notice of Refusal to Pay Sanctions of April 11,

1967 and the statement of the alternatives available to plaintiffs in Perovich's appellant brief.

Contrary to plaintiffs' apparent assumption, courts have shown no hesitation in dismissing civil antitrust damage cases, and certainly have not treated antitrust cases as something sepcial, less susceptible to dismissal when a plaintiff fails to prosecute or defies court orders. In Sandee Manufacturing Company v. Rohm and Haas Company (7th Cir. 1962) 298 F.2d 41, an antitrust case was dismissed when the plaintiff failed to begin pretrial, i.e. to present the documentary evidence that he would rely on. In Becker v. Safelite Glass Corp. (D.Kans. 1965) dismissal was ordered when plaintiff failed to properly expedite his antitrust action. The Handbook for Effective Pretrial Procedure, Judicial Conference 1964, 37 F.R.D. 255, 268 specifically suggests that in the protracted or big case the court should tighten its control of the case; obviously control can only be tightened if a court acts swiftly to enforce its pretrial orders.

Failure to pay sanctions has itself been held to justify dismissal. Refior v. Lansing Drop Forge (6th Cir. 1942) 124 F.2d 440.

For other cases upholding dismissals see: Levine v. Colgate-Palmolive Company (2nd Cir. 1960) 283 F.2d 532, cert denied 365 U.S. 821 (not appearing for trial at the time set at the pretrial conference); Wirtz v. Hooper v. Hommes Bureau Incorporated (5th Cir. 1964) 327 F.2d 939 (failure to comply with a court order to supply the other party with a list of witnesses); Package Machinery Company v. Hayssen Manufacturing Company (7th Cir. 1959) 266 F.2d 56 (plaintiff's refusal to supply defendants

with a more specific statement of certain trade secrets); Sleek v. J. C. Penney Company (W.D.Pa. 1960) 26 F.R.D. 209 (failure of plaintiff to comply with a local pretrial order as to filing a pretrial statement, despite notices); Fitzsimmons v. Gilpin (9th Cir. 1966) 368 F.2d 561 (taking no proceedings other than filing suit); Janousek v. Wells (8th Cir. 1962) 303 F.2d 118 (cluttering up the proceedings with numerous motions, while not giving approval to have the case tried soon); and Wisdom v. Texas Company (N.D.Ala. 1939) 27 F.Supp. 992 (nonappearance at pretrial conference).

It certainly seems fair to generalize from the foregoing cases that failure to comply with a court order or failure to perform a step necessary to the continuation of the case will furnish ample grounds to justify the trial court in exercising its discretion to dismiss the action.

The status of the Perovich case in the spring of 1966 can be aptly compared with the condition of Russell v. Cunningham (9th Cir. 1956) 233 F.2d 806 in August of 1955. The court, after describing how the case had been at issue for fifteen months, summarized the situation as follows:

> "Here, all the record shows is a long delay, two continuances, and no sign that appellant was any nearer to trial in August of 1955 than he was in April of that year or in June of the previous year at the time of the pre-trial order. While the case involves nowhere near the abuses found in the typical situation where F.R.C.P. 41(b) is invoked, it cannot be said that the District Court abused its discretion without resorting to contentions of fact not found in the

"record."

Russell v. Cunningham (9th Cir. 1956)

233 F.2d 806, 811

The court's language can as well be applied to the Perovich case. To paraphrase: "All the record shows is a long delay, several continuances, and no sign that appellant was any nearer to a pretrial memorandum in April of 1967 than he was in December 1966 or for sometime previously."

3. No Case in Which an Abuse of Discretion in Dismissing Has Been Found Bears any Important Resemblance to the Perovich Case.

Cases in which abuse of discretion in dismissing has been found bear virtually no resemblance to the Perovich case. The cases on which appellant leans most heavily generally involve inadvertence, a much smaller lapse of time than in the Perovich case, or other mitigating features not to be found in the Perovich case. A clerk's failure to issue a summons, a four-month-old case dismissed, a new plaintiff, a clerk's assurance to an attorney, are examples. They simply do not come to grips with the issue here presented as illustrated by the following short summary of the cases cited by plaintiff.

In Jefferson v. Stockholders Publishing Company (9th Cir. 1952) 194 F.2d 281, the clerk failed to issue summons forthwith. The appellate court held that therefore the district court was not deprived of jurisdiction to hear the case and that dismissal was not warranted.

In Meeker v. Rizley (10th Cir. 1963) 324 F.2d 269, the court held that the default judgment for the defendants must be set aside since no three-day notice had been given to the

plaintiff as required by Rule 55(b)(2). Treating the district court's action as a dismissal under Rule 41(b) the appellate court held that the dismissal of a four-month-old case where plaintiff failed to attend a hearing was not justified.

In Stanley v. Alcock (5th Cir. 1962) 310 F.2d 17 a trustee in bankruptcy was plaintiff. The appellate court held that a motion for summary judgment for the defendant should not have been granted. In addition, the court held as to dismissal that the plaintiff's attorney was not in default in not attending hearings on a motion when his client had died before the date of the hearing, since a new trustee gets a reasonable amount of time to acquaint himself with the issues of the case. As to lack of prosecution, the court found extenuating circumstances not present in Perovich. The case did not present facts similar to most of those in which dismissal has been upheld; and the dismissal by the trial court appears to have been a make-weight to support the broader basis of a summary judgment granted for lack of triable issues of fact. (It is interesting that plaintiff generalizes this case into "the need for new personnel to familiarize themselves with the issues." [Appellant's Brief, p. 40, lines 2-3] Of course the case was not concerned with a change of attorneys but with a change of plaintiffs.)

In Red Warrior Coal & Mining Company v. Baron (3rd Cir. 1952) 194 F.2d 578, the case was dismissed after the clerk assured the attorney that it would be put over for a week, and the attorney relied by allowing a witness to stay in Los Angeles.

In Davis v. Operation Amigo Incorporated (10th Cir. 1967) 378 F.2d 101, the case was filed on December 10, 1965. It was at issue on February 3, 1966, and trial was set for

March 29. On March 28 plaintiff's attorney said his client had pneumonia. Here the court held that dismissal was too harsh and emphasized the brief time involved so far in the litigation.

In Bon Air Hotel Incorporated v. Time Incorporated (5th Cir. 1957) 376 F.2d 118, the court held that there could be no dismissal under Rule 37 relating to discovery, where the non-production of a witness was not the fault of the plaintiff, who did his best to secure the witness' attendance.

Independent Productions Corporation v. Loew's Incorporated (2nd Cir. 1960) 283 F.2d 730 held that there could be no abrupt dismissal when the specific procedure of Rule 37 applies.

Syracuse Broadcasting Corporation v. Newhouse (2nd Cir. 1959) 271 F.2d 910 held that Rule 16 gives no power to dismiss for failure to state a claim, etc., and for such purposes summary judgment should be used.

It can be readily seen that the cases cited by plaintiff involve facts not at all similar to those found in the Perovich case. In fact, dismissal has been upheld in cases involving conduct less dilatory and contemptuous than that of Perovich.

4. Factors Urged by Plaintiff in Mitigation of His Conduct Have Been Rejected in Other Cases.

a. A new attorney is not entitled to enter the case with a clean slate, contrary to the implications of plaintiff's argument.

In several of the cases in which dismissal was upheld new attorneys brought into an action received much less consideration than did Perovich's third attorney. Thus, in Grunewald v. Missouri Pacific Railroad (8th Cir. 1964) 331 F.2d 983,

plaintiff's third attorney told the court that he would represent plaintiff if the case would be continued. No continuance was granted, so he had no client. The appellate court pointed out that dismissal of the matter was within the court's discretion. The court said that granting a continuance to new counsel is also a matter of discretion.

> "It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. * * * Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated."
>
> Grunewald v. Missouri Pacific Railroad
>
> (8th Cir. 1964), 331 F.2d 983, 985-986

An annotation at 48 A.L.R. 2d 1155, discussing the withdrawal or discharge of counsel in civil cases as ground for continuance, was quoted in the Grunewald case:

> "It is of interest in this connection to note that the cases in which the refusal of continuance was held justified outnumber, by a ratio of three to one, the cases in which the refusal of continuances was held arbitrary -- a clear indication of the fact that the exercise of discretion by the trial court will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence."
>
> 48 A.L.R. 2d 1155, 1159, quoted at 331 F.2d 986

Even more telling for the Perovich case is the A.L.R. language which immediately follows:

> "There is not a single case involving the discharge of an attorney in which it was held that a continuance should have been granted for this reason, the taking by the party of an affirmative step causing lack of representation at the trial apparently being considered negligence or lack of diligence."

48 A.L.R. 2d 1155, 1159

In Refior v. Lansing Drop Forge (6th Cir. 1964) 124 F.2d 440 plaintiff's second local counsel withdrew from the case when it came on for hearing. At this point the court ordered a continuance for one week -- not the seventy-six days obtained by Mr. Weinstein -- upon the payment by plaintiffs of $100 in costs. When plaintiff refused to pay, or proceed with the trial within one week, the case was dismissed. Yet the appellate court upheld the dismissal, stating as follows:

> "Parties to litigation are entitled to its prosecution with reasonable diligence. Where prejudice results to one party by failure on the part of the party on whom rests the burden of going forward with a cause within a reasonable time to bring about its determination, the injured party has the right to move for dismissal. Actual injury may either be shown or inferred from the lapse of time if the lapse be great.
>
> "Every litigant has the duty to comply with the reasonable orders of the court and, if

"such compliance is not forthcoming, the court has the power to apply the penalty of dismissal."

Refoir v.Lansing Drop Forge (6th Cir. 1942) 124 F.2d 440, 444

In Deep South Oil Company of Texas v. Metropolitan Life Insurance Company (2nd Cir. 1962) 310 F.2d 933, the case was filed in August 1957. In November 1961, after the case already had been delayed twice at plaintiff's request, the plaintiff had the case adjourned until February 1, 1962. On January 8, plaintiff's counsel retired. Thereafter the judge wrote the former counsel to urge plaintiff to hurry, as trial was set for February 1. When plaintiff's president requested an adjournment, the case was adjourned until February 5. At this time plaintiff's new attorney asked that the case be put over until the fall. The court would have given them a few days but dismissed when counsel was unwilling to take the case under those conditions. This case illustrates the rule that a new attorney is not automatically entitled to a continuance where there have been past continuances granted.

It is worth pointing out that Deep South is not a case where the attorney was discharged by plaintiff, which Perovich is. Thus there was even less reason in Perovich to allow lengthy delay merely because plaintiff had new counsel. It is not necessary that new counsel (given a generous amount of time in which to complete remaining work on the case) be allowed to reopen old matters already decided by the trial court or by former counsel. To allow delay to be grafted onto delay can only increase the prejudice to the defendants.

b. That plaintiff's attorney was not prepared within the proper time is no excuse.

A party who might have been prepared may not obtain a continuance merely because he is not prepared. In United States v. Pacific Fruit and Produce Company (9th Cir. 1943) 138 F.2d 367 the court stated that lack of preparation is no grounds for continuance unless there is a valid reason.

Similarly, Link v. Wabash Railroad Company (1962) 370 U.S. 626, the leading Supreme Court case on this subject, involved the failure of an attorney to attend a pretrial conference because he was doing other work. The Seventh Circuit in that case (291 F.2d 542) stated that preparing out of court work in another case with knowledge of the date set for the pretrial conference falls far short of being a legitimate excuse. To draw a fairly reasonable parallel, preparing a rehash of motions already heard by the trial court judge with full knowledge that a trial brief will soon be due, should not excuse the noncompletion of the brief.

c. Efforts to settle an action do not constitute compliance with court orders to prepare a brief.

In Appellant's Opening Brief plaintiff makes much of counsel's efforts to settle the action instead of writing the trial brief. (p. 49) Plaintiff states that "hence, while he was not working directly on the trial brief, he was working toward resolution of the cases." [Appellant's Brief, p. 49, lines 15-17] But efforts to settle the action are not "proceedings" as to lack of prosecution. Federal Deposit Insurance Corporation v. Lotsch (E.D.N.Y. 1944) 3 F.R.D. 464. This rather obvious proposition becomes worth noting only because plaintiff seems to consider his

efforts to settle the case as being some kind of compliance with the requirement for a pretrial memorandum.

d. Delayed offers to obey court orders do not constitute compliance.

Similarly, plaintiff makes much of his belated offer to pay the sanctions -- and to write a trial brief if only given a sixth extension. Naturally, this offer did not come until after defendants had moved to dismiss the action. But such subsequent diligence -- and in this case it could hardly be called "diligence" since it was conditioned on yet another substantial extension of time -- is not sufficient.

> "Moreover, an order of dismissal may be granted notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence."
>
> Hicks v. Bekins Moving and Storage Co.
> (9th Cir. 1940), 115 F.2d 406, 409

B. THE DISTRICT COURT MAY IMPOSE SANCTIONS FOR AN ACT WHICH THE COURT CONCLUDES DOES NOT WARRANT OUTRIGHT DISMISSAL.

Plaintiff seems to believe that it is error to impose sanctions for an action that does not itself warrant dismissal. (Cf. Appellant's Brief, p. 3, lines 5-8 and p. 57) It is significant that plaintiff failed to cite any authority for this proposition. In fact, as might be logically expected, the law is precisely the opposite. Sanctions may be imposed in just those situations in which dismissal is inappropriate. In Matheny v. Porter (10th Cir. 1946) 158 F.2d 478, the court penalized defendant for failure to comply with a trial order by denying it the right to introduce certain evidence. The appellate court

agreed that the court had power to discipline defendants for noncompliance with their pretrial order and said that this was subject to a reasonable discretion. In this case the court's response seemed drastic, said the appellate court, but the trial court might well have imposed the costs incurred.

> " * * * The court had power to discipline the defendant for failing to comply with the pretrial conference order. And in the exercise of that power, the court was clothed with reasonable discretion in determining what measure of discipline was appropriate and should be imposed. The court might well have required the defendant to pay all costs incurred in connection with the presence of the witnesses in court, might well have taxed against defendant all costs incurred up to that time, or might well have imposed some other reasonable exaction. The withdrawal from defendant of the right to introduce any evidence in his own behalf bearing upon the issues of fact in the case seems drastic." [Emphasis added]

Matheny v. Porter (10th Cir. 1946)

158 F.2d 478, 480

See also: Meeker v. Rizley (10th Cir. 1963) 324 F.2d 269, citing Matheny.

In Gamble v. Pope Talbot& Incorporated (E.D.Pa. 1961) 191 F.Supp. 763, modified (3rd Cir. 1962) 307 F.2d 729, cert denied 371 U.S. 888, the court held that a proper remedy for the defendant's delay, caused by oversight of counsel, was the imposition of costs regarding witness and counsel fees. Citing

Matheny v. Porter, supra, the court asked plaintiff to submit an order imposing costs caused by the defendant's delay. (On appeal the Third Circuit held that the trial court did not have the authority to impose the penalty upon the attorney.)

Plaintiff also asserts, again without citation of any authority, that the sanctions were unlawful because they were based on unverified statements of defendants' counsel. Attorneys do not submit a verified affidavit of their charges when charging a client. Courts do not require such an affidavit, in those actions in which attorneys' fees may be recovered; rather they award "reasonable fees." The approach used in Munson Line Incorporated v. Green (S.D.N.Y. 1947) 6 F.R.D. 470, 475 is characteristic.

> " * * * Accordingly the plaintiff is entitled to an order directing defendants to pay it the reasonable expenses which it has incurred, including reasonable attorney's fees. The sum of $250 seems to me reasonable and will be allowed."
>
> Munson Line, Inc. v. Green (S.D.N.Y. 1947)
> 6 F.R.D. 470, 475

The court simply sets the attorneys fees. Since the fees are whatever the attorney reasonably charges his client (or as the case might be his opponent) the idea that these charges are a matter of cold facts to be determined by affidavits for cross-examination makes little sense. In any event, defendants submitted detailed, itemized statements in support of their attorneys fees, which set forth the time spent each day and described the work performed. [C.T. 3602-3627] The important point is that the fees represented additional expenses

incurred by the defendants as a result of Perovich's discharge of his second counsel.

Plaintiff irrelevantly (p. 58, note 4) finds "shocking" Judge Pence's assessment of sanctions against Inplace Linings Incorporated. (That action has been settled and is not the subject of an appeal.) Inplace Linings Incorporated went along with Perovich's action in discharging Hall as Inplace had done in all other aspects of the litigation. Throughout the proceedings Inplace was essentially a free-rider. Perovich and his Northwest corporate entity paid their attorney fees on an hourly basis, while Mr. Hall handled the action on behalf of Inplace on a contingent fee basis. (R.T. 1/17/67, p. 96, line 20 to p. 98, line 8).

C. A PLAINTIFF MAY NOT REFUSE TO OBEY ORDERS OF THE COURT AS TO THE PAYMENT OF SANCTIONS AND THE FILING OF A TRIAL BRIEF IN ORDER TO GAIN QUICK REVIEW OF COLLATERAL MOTIONS NOT NORMALLY SUBJECT TO INTERLOCUTORY APPEAL, UNLESS THE COURT'S GROUNDS FOR DISMISSAL ARE THEMSELVES INVALID.

Unless the plaintiff can show that the lower court abused its discretion in (1) ordering payment of sanctions and (2) failing to give more time for the pretrial brief, the plaintiff must lose his case. Plaintiff must show both of these points since the dismissal was made for both reasons. If the trial court was correct on either or both of these points, there should be no reversal even if the trial court erred, as alleged, in ruling on any of the collateral motions.

Allied Air Freight Incorporated v. Pan American World Airways Incorporated (2nd Cir. 1968) 393 F.2d 441 does not hold to the contrary. The court there simply held that a non-

appealable stay would be reviewed when the case was later dismissed for lack of prosecution. There the stay prevented the plaintiff from pursuing his district court remedies without exhausting administrative remedies. Under another order, however, plaintiff was under an obligation to commence proceedings within ninety days or have his case dismissed. Under those circumstances the stay, which coupled with the ninety-day order to keep him out of court, was reviewable upon the subsequent dismissal.

If it be conceded that the trial court's orders as to sanctions and as to dismissal for lack of prosecution were themselves proper, then to reverse the case because of the errors alleged in plaintiff's fourth issue, would put the stamp of judicial approval on the following situation:

The trial court issues a nonappealable order with which plaintiff disagrees. Therefore, plaintiff proceeds to violate some otherwise valid order, such as one relating to the payment of costs or one relating to the preparation of a pretrial memo, in order to get the case dismissed. The case is dismissed, since the court's authority is being flouted, and, it is determined the dismissal is proper. Nevertheless plaintiff could argue as follows: "Had it not been for the first erroneous order, I would not have defied the court in the later matter. Therefore, I have a right to have the earlier matter reviewed." Such a right would encourage wholesale disregard of court orders by litigants unhappy with pretrial rulings.

The case of Siebrand v. Gossnell (9th Cir. 1956) 234 F.2d 81, cited by appellant, is not opposed to this view. There defendant Carroll appealed from an order denying his motion to satisfy a judgment for $100 against him, but he did not appeal

from the judgment. The motion appealed from was not appealable. According to the court the nonappealable rulings in themselves could be reviewed on a later appeal. Again, however, this is a long way from saying that a plaintiff may gain review of a non-appealable interlocutory order simply by defying the court in some other particular. If plaintiff's position were the law, then there could be many situations in which a trial court had no choice but to dismiss the case, and justifiably so, and yet might be reversed!

On the other hand, if plaintiff prevails on appeal with his claims that the sanctions were beyond the authority of the court; and that the dismissal of the failure to pay sanctions, for failure to obey orders as to the memorandum, and for failure to prosecute was an abuse of discretion; then the appellate court may proceed to consider the other collateral motions. They should not be considered otherwise, because plaintiff will not have prevailed on the issue of dismissal.

D. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTIONS TO AMEND, TO VACATE THE PROTECTIVE ORDER, AND TO RECONSIDER THE COURT'S RULING REGARDING EVIDENCE OF AGREEMENTS AFFECTING THE CONCRETE PIPE INDUSTRY.

A concise exposition of defendant's arguments in support of its position relating to these motions may be found in the text of its memorandum of March 29, 1967. [C.T. 3786-3811]

The court properly denied plaintiff's motion to file a second amended complaint stating a Section 2, Sherman Act violation, for several reasons. First the plaintiff waived any Section 2 claims. Plaintiff's original complaint alleged three causes of action, one of which was a Section 2 violation. After

a motion to dismiss had been granted, however, plaintiff filed an amended complaint stating only two causes of action. Omitted was the cause of action alleging the offenses of Section 2 of the Sherman Act. Much later as the trial date neared, plaintiffs had announced that they intended to amend to add § 2, but failed to do s within a reasonable period of time. Second, amendments close to trial should be denied when no new facts are shown. Plaintiff admits that no new facts were shown in this case. [C.T. 3723, lines 14-15] Third, a Section 2 amendment would have been inherently disruptive and would have required a reopening of discovery. In order to defend against a Section 2 charge, it would be necessary for defendants to gather the market data necessary in defending an "attempt" case. Section 2 introduces the issue of "dangerous probability" of actual monopolization, an issue which can be evaluated only against relevant geographical and product market data. Swift & Company v. United States, 196 U.S. 375 (1905); Walker Process Equipment Company v. Food Machinery Corp. 382 U.S. 172 (1965).

The court properly denied plaintiff's motion for an order vacating or modifying the protective order regarding defendants' documents. In relation to this motion the court had previously heard all of the arguments of the plaintiff, presented in a Memorandum of Points and Authorities dated October 23, 1966 and in the hearing of December 13, 1966. In any event, there was no showing by Perovich and Davin of any sufficient need for them personally to inspect defendants' competitively sensitive documents. In fact, plaintiff's attorney Les J. Weinstein, Esq. spent a total of only forty-five minutes in these files, before pronouncing them unintelligible.

[C.T. 3763] In addition, despite plaintiff's contentions, expert assistance is available and had been used in the related No-Joint cases. [R.T. 12/13/66, p. 39, line 3] Plaintiff's argument that Mr. Perovich is no longer in the pipe lining business and does not intend to pursue the same must be taken with some skepticism, considering that Mr. Perovich in 1967 was only thirty-eight [C.T. 3801] and considering Mr. Perovich's demonstrated lack of veracity, detailed in the statement of the case. The only plausible problem in reading the documents in the depository was the use of technical terms therein; Mr. Weinstein could have at any time asked Mr. Perovich or Mr. Davin to explain the terms. [Cf. the Protective Order, C.T. 3591-3594] In addition the defendants presented evidence that a former employee of one of the defendants (V.L. Greedy) who joined plaintiff Inplace had taken much of the defendant's valuable, secret and confidential information regarding inplace rehabilitation with him. That information, in turn, was disclosed by Mr. Davin to Mr. Perovich. [Affidavit of William McD. Miller, C.T. 2588-2591] Plaintiffs argue that the defendants did not seek a protective order barring each other from access to the document depository, but only counsel had such access.

Finally the trial court did not err in denying plaintiff's motion to reconsider the court's ruling precluding discovery relating to alleged agreements to allocate concrete pipe jobs among defendants. The Perovich plaintiffs are engaged in the business of inplace rehabilitation of steel and cast iron pipe, a service performed by contractors, which is not competitive with the manufacture and sale of concrete pipe. On October 3, 1966 the court denied plaintiffs the right to undertake

wholesale discovery regarding the concrete pipe industry, but permitted them to pursue discovery to show the existence of a link or tie-in between evidence of agreements affecting the sale of concrete pipe and the alleged agreement to eliminate plaintiff's competitors in the business of inplace rehabilitation of steel and cast iron pipe. Already plaintiffs had deposed numerous witnesses in depth concerning the alleged market sharing agreements affecting concrete pipe, and had failed to establish any connection between those alleged agreements and the business of inplace rehabilitation of cast iron and steel pipe. [R.T. 10/3/66, p. 55, lines 13-20] Plaintiff's attempted analogy to the No-Joint cases is fallacious since there the plaintiff's product was concrete pipe -- the same product sold by the defendants. [C.T. 3806]

Finally, appellant's unsupported conclusion that the district court's ruling would constitute reversible error under Continental Ore Company v. Union Carbide (1962) 370 U.S. 690 does not withstand analysis. There, the court reversed a verdict holding that excluded evidence of a conspiracy relating to the sale of vanadium oxide was admissible, since the jury could reasonably infer from that evidence that defendant's conduct was the cause of plaintiff's loss. 370 U.S. at 697. Thus, Continental Ore dealt with causation and does not stand for the proposition that evidence of an illegal agreement affecting one industry is sufficient to allow a jury to infer that plaintiff's losses in another distinct industry were caused by the illegal agreement. Nor does it stand for the proposition that evidence of an illegal agreement affecting one industry supports an inference of a conspiracy to eliminate a plaintiff in another separate industry.

CONCLUSION

Plaintiff seeks to give the impression that a tough and despotic trial court judge, setting unrealistic deadlines, unfairly prevented him from bringing his action to trial. Yet the record shows that Judge Pence granted five extensions of time for the plaintiffs to file their trial brief. He bent over backwards in allowing plaintiffs to present complex motions which he had resolved once before. The plaintiffs were simply unwilling to comply with the court's schedules and orders. Rather than comply with the order to prepare a brief by April 4, 1967, plaintiffs engaged in a futile effort to redo prior matters. Upon losing on those matters, plaintiffs elected -- and it is quite clear from the facts that it was not an election forced upon them by alleged poverty -- to defy the court's orders imposing sanctions and setting April 27 as the due date for the trial brief. Plaintiff made it quite clear at that time that he wanted to seek his remedy in the Court of Appeal. Judge Pence clearly had no choice but to dismiss the action for failure to prosecute and for failure to comply with his orders; anything less would have rewarded direct defiance of the solemn orders of a United States District Court. That being so, the Court of Appeals should have no hesitation in affirming the judgment.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
JOHN J. HANSON
ROBERT E. COOPER
DOUGLAS M. HINDLEY

Robert E. Cooper

Robert E. Cooper, Attorneys for Appellee United Concrete Pipe

AFFIDAVIT OF JOHN J. HANSON

John J. Hanson, being first duly sworn, deposes and says:

1. I am an attorney and am a member of the Bar of the State of California, United States District Court for the Central District of California and the United States Court of Appeals, Ninth Circuit. I am a partner with the law firm of Gibson, Dunn & Crutcher and have been actively engaged in the practice of law with that firm since 1955.

2. I represented United Concrete Pipe Corporation, one of the defendants in B. W. Perovich v. Pipe Linings, Inc. et al., Superior Court of the State of California, County of Los Angeles, No. 775,274. In his complaint Mr. Perovich charged defendants with unfair trade practices and a conspiracy to restrain trade, and sought monetary damages.

3. On March 2, 1962, a settlement of Mr. Perovich's action was effected as to all parties. On that date, Mr. Perovich was paid the sum of $80,000, and he executed a release in favor of all defendants. Mr. Perovich's action was then dismissed with prejudice.

John J. Hanson

SUBSCRIBED AND SWORN TO
this 29th day of January, 1969

Notary Public in and for Said County and State

Margaret M. Knighton

My Commission Expires June 15, 1970

[EXHIBIT A]

MARGARET M. KNIGHTON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

DISTRICT OF HAWAII
HONOLULU 96813

September 21, 1966

[illegible] Hall, Esq.
[illegible] Federal Building
[illegible] South Spring Street
[illegible] Angeles, California 90013

Re: [illegible]

Dear Mr. Hall:

[illegible] court is disturbed that you have not only taken so long but [illegible] actually waited until Mr. Cooper called this matter to your [illegible] attention, before you responded suitably to your position regarding [illegible]-trial order No. 4. The problems actually raised, as well as [illegible] inferred by you, can be resolved as it now stands without a [illegible] hearing -- at the very earliest date possible to this court and [illegible] counsel. This court is still scheduled that there cases shall be [illegible] as now presently set, viz., February 13, 1967.

[illegible] page 2 of your letter you indicate that you have several motions [illegible] you want upon the agenda of my hearing. My records do not [illegible] that any such motions have been filed -- and no motion is set [illegible] forth as to why they haven't been filed long heretofore.

[illegible] court will hold a pre-trial hearing in Los Angeles beginning [illegible] 10:00 A.M. on Monday, October 3, 1966, to consider your objec- [illegible] to proposed pre-trial order No. 4, as well as such motions [illegible] you shall file, with accompanying memoranda, not later than [illegible] Monday, September 26, 1966, at 11:00 Noon. Defendants will not be required to file answering memoranda but will be prepared to [illegible] oral argument regarding who said at time of hearing. [illegible] Plaintiff will also file by that date plaintiff's response to [illegible] defendants' objections to plaintiff's written interrogatories.

[illegible] court calls your attention to the fact that it has not yet [illegible] all plaintiff's answers to defendants' [illegible] interrogatories to [illegible] plaintiff" dated June 24, 1966 and "defendants' special [illegible] interrogatories to each plaintiff re plaintiff's damage claims", [illegible] August 5, 1966. Plaintiff's answers to these interrogatories [illegible] due on September 15, 1966.

[illegible] other relevant problems will also be considered at the hearing.

Sincerely,

Albert Lee

[illegible] Sheppard, Mullin, Richter & Hampton
[illegible] Hill, Farrer & Burrill
[illegible] Ichinda, Watson & Miyazaki
Gibson, Dunn & Crutcher

9-23-66

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, KATHLEEN KENNEDY, being first duly sworn, depose and say:

I am a citizen of the United States of America, and a resident of the county aforesaid; I am over the age of eighteen years, and not a party to the within-entitled action; my business address is 634 South Spring Street, Los Angeles, California 90014.

On January 30, 1969, I served the within APPELLEE'S BRIEF on the Appellant herein by placing two true copies thereof, enclosed in a sealed envelope, with postage thereon fully pre-paid, in the United States mail at Los Angeles, California, addressed as follows:

Les J. Weinstein, Esquire
McKenna & Fitting
427 West Fifth Street
Los Angeles, California 90013

Kathleen Kennedy
Kathleen Kennedy

SUBSCRIBED AND SWORN to before me this 30th day of January, 1969.

Notary Public in and for Said County and State Margaret M. Knighton

My Commission Expires June 15, 1970

OFFICIAL SEAL
MARGARET M. KNIGHTON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

No. 22217

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOLLYWOOD NATIONAL BANK,

Appellant,

vs.

A. J. BUMB,

Appellee.

APPELLANT'S OPENING BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOLLYWOOD NATIONAL BANK,

Appellant,

vs.

A. J. BUMB,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from an order entered on March 23, 1967, by the United States District Court for the Central District of California, denying appellant's petition to review and reverse an order of the Referee in Bankruptcy in Chapter XII proceedings. Appellant (also called "the bank" herein) became involved in the Chapter XII proceedings when, upon the filing of an application by appellee (also called "the trustee" herein), the referee ordered appellant to appear and show cause why the referee should not find and order that appellant had damaged the estate [Application, R. 1-43; Order to Show Cause, R. 44-45]. Thereupon, appellant appeared specially, challenged the referee's jurisdiction to adjudicate the issue raised in the application, and

moved for a dismissal of the application and the order to show cause [R. 91-94].

When the referee denied appellant's motion [R. 46-47], it filed a petition for review [R. 48-49] pursuant to Section 39c of the Bankruptcy Act, 60 Stat. 326 (1946), as amended, 11 U.S.C. §67(c). The District Court's jurisdiction to consider the petition for review and the motion for dismissal rested upon said statute as well as upon Section 2a(10) of the Bankruptcy Act, 30 Stat. 545 (1898), as amended, 11 U.S.C. §11(a)(10). When the District Court denied the petition and motion [R. 76-77], appellant filed a notice of appeal [R. 79] in the time required by Section 95 of the Bankruptcy Act, 30 Stat. 553 (1898), as amended, 11 U.S.C. §48.

This Court's jurisdiction rests upon Section 416 of the Bankruptcy Act, 52 Stat. 918 (1938), 11 U.S.C. §816, and Section 24 of the Bankruptcy Act, 30 Stat. 553 (1898), as amended, 11 U.S.C. §47.

Statement of the Case.

In December of 1965, appellant, Hollywood National Bank, acted as escrow holder for the sale of a piece of real property consisting of land and apartment houses thereon, known as Sycamore Manor; in January of 1966, the bank acted as escrow holder for the sale of similar real property known as Mountain View Manor. In each escrow, the seller was appellee, as the duly appointed trustee for the estate of the debtor in Chapter XII proceedings, and the buyer was one San Ysidro

Ranch Corporation. The trustee sold Sycamore Manor and Mountain View Manor pursuant to the referee's orders authorizing their sale [R. 9-12, 17-19; R. 27-30, 35-37]. The orders did not make mandatory, but permitted, the opening of escrows to consummate the sales.

The buyer approved by the referee and the trustee saw fit to contract with the bank to handle escrows for the sales. The bank had no connection with the sales other than as the escrow agent of the seller and of the buyer. The bank did not at any time own any part of the properties that were conveyed by means of the escrows, nor did the bank ever have any other right, title or interest in or to any part of the properties.

The bank has not participated in any way in the Chapter XII proceedings. This appeal is necessary because the referee is attempting to assert summary jurisdiction over the bank in such proceedings for the purpose of adjudicating whether the estate was damaged by the bank in closing the escrows.

In an application to the referee [R. 1-43], the trustee alleged that the bank violated the escrow instructions and thus damaged the estate in the total sum of $81,610.22 ($51,917.40 in connection with the Sycamore Manor escrow and $29,692.82 in connection with the Mountain View Manor escrow). Based on this application, the referee ordered the bank to show cause why it should not be held liable for said sums [R. 44-45].

The bank moved to dismiss the trustee's application and the order to show cause on the ground that the referee "has no jurisdiction over the subject of said application . . ., and lacks the power to issue the orders contemplated by said Order to Show Cause" [R. 91-94; lines 24-27 of R. 91]. The referee denied the motion to dismiss [R. 46-47]; when the District Court denied appellant's petition for review and dismissal [R. 76-77], this appeal followed [R. 79].

Although the bank denies that it closed the escrows in violation of the escrow instructions and denies that the estate has been damaged by the closings [Answer, R. 50-56; Counter-Claim and Cross-Complaint, R. 57-62], these issues are not involved in this appeal. The referee has not yet adjudicated such issues, and whether he has summary jurisdiction to do so is the sole issue involved in this appeal.

Statutes Involved.

I.

Section 2 of the Bankruptcy Act, as amended (11 U.S.C. §11), provides, in pertinent part, as follows:

> "a. The courts of the United States herein before defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation,

in chambers, and during their respective terms, as they are now or may be hereafter held, to—

. . .

(6) Bring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

. . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act:

provided, however, That an injunction to restrain a court may be issued by the judge only;

. . .

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

II.

Section 23 of the Bankruptcy Act, as amended (11 U.S.C. §46), provides as follows:

"a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

Specification of Errors Relied On.

I.

The Referee erred in denying the motion for dismissal.

II.

The District Court erred in denying the petition for review and dismissal.

III.

The Referee and District Court erred in holding that the Referee in Bankruptcy has jurisdiction to make the determinations and issue the orders contemplated by the Application for Order to Show Cause for Damages for Wrongful Close of Escrow.

Summary of Argument.

I.

Courts of bankruptcy do not have summary jurisdiction over controversies not strictly or properly part of the proceedings in bankruptcy.

II.

The summary jurisdiction of bankruptcy courts is limited to the jurisdiction conferred upon them by the Bankruptcy Act even though the bankruptcy courts apply principles of equity.

III.

A court of bankruptcy does not have summary jurisdiction over a trustee's suit for breach of contract.

ARGUMENT.

I.

Courts of Bankruptcy Do Not Have Summary Jurisdiction Over Controversies Not Strictly or Properly Part of the Proceedings in Bankruptcy.

The Bankruptcy Act provides no authority to a court of bankruptcy to make summary disposition of the trustee's claim against the bank, and "[t]he bankruptcy court has no broader power than that conferred upon it by statute." *Lowenstein v. Reikes* (2nd Cir. 1931), 54 F. 2d 481, 483, *cert. denied,* 285 U.S. 539, 52 S. Ct. 311, 76 L. Ed. 932.

"The summary jurisdiction of (the bankruptcy) Court has been confined to matters in rem and by its very nature is based upon the actual or constructive possession of the res in the debtor or his agent at the time of the filing of the petition in bankruptcy." *In re Spur Fuel Oil Sales Corp.* (E.D.N.Y. 1962), 204 F. Supp. 696, 698. Thus, summary proceedings are appropriate only when the court is handling "matters relating to the administration of the bankrupt's estate and the property in the court's possession" (2 *Collier on Bankruptcy* 438 [14th ed.]).

Section 2 of the Bankruptcy Act (11 U.S.C. § 11) lists various powers of the bankruptcy courts; these powers can be exercised summarily and include the adjudication of controversies strictly and properly part of the administration of the bankrupt's estate and proper-

ty in the court's possession. However, in *Bardes v. First National Bank of Hawarden* (1900), 178 U.S. 524, 535, 20 S. Ct. 1000, 1005, 44 L. Ed. 1175, 1181, the Supreme Court emphasized the limitations upon the summary jurisdiction created by Section 2, as follows:

> "The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties 'in proceedings in bankruptcy', and, in clause 15, to make orders, issue process and enter judgments, 'necessary for the enforcement of the provisions of this Act.'
>
> "The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.' "

The Supreme Court then pointed out that the words "herein otherwise provided" refer to Section 23 of the Bankruptcy Act. *Ibid.* Pointing out that the second clause of Section 23 covers "controversies, not strictly or properly a part of the proceedings in bank-

ruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings," (*Id.* at 178 U.S. 537-538), the Court concluded as follows:

> "The provisions of the second clause of section 23 of the Bankruptcy Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties. . . ." (*Id.* at 178 U.S. 539.)

Thus, whether the trustee in the present case is asserting title to money as an asset of the estate or is attempting to collect a debt, Section 23 prevents the referee from assuming summary jurisdiction. A bankruptcy court obviously cannot adjudicate such controversies in that Section 23 provides that they must be brought "in the same manner" and "in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted. . . ." (There is no issue in the present case involving consent, or proceedings under Sections 60, 67, or 70 of the Bankruptcy Act.)

In the case of *In re Houston Seed Co.* (N.D. Ala. 1954), 122 F. Supp. 340, the trustee moved for disallowance of certain creditors' claims and filed counterclaims against them for a money judgment in the bankruptcy court; the counterclaims sought recovery for moneys loaned by the bankrupt, for negligent mismanagement of the bankrupt's affairs, for fraudulent misappropriations, for deceit, and for breach of fiduciary duties as officers and directors of the bankrupt. In spite of the fact that a claim had been filed and

the fact that the parties being sued by the trustee had owed fiduciary obligations to the bankrupt, the court ruled that the bankrupt court did not have jurisdiction to adjudicate the trustee's causes of action for sums beyond the amounts set out in the proofs of claims.

Even if a bankruptcy court attempts to proceed in a formal, plenary manner in adjudicating such causes of action, it can not do so because of lack of jurisdiction. The *Houston* court pointed out that such suits "fall within Section 23" and "under Section 23 jurisdiction of plenary suits encompassing 'controversies at law and in equity, as distinguished from proceedings under this title' is withdrawn from courts of bankruptcy." *Id.* at 342.

II.

The Summary Jurisdiction of Bankruptcy Courts Is Limited to the Jurisdiction Conferred Upon Them by the Bankruptcy Act Even Though the Bankruptcy Courts Apply Principles of Equity.

It is apparently appellee's position that the referee has jurisdiction in the present case because bankruptcy courts have "equity jurisdiction."

Even if the trustee's application stated an equitable cause of action and prayed for equitable relief (instead of praying for damages resulting from breach of contract), the fact remains that the referee's "equity jurisdiction" is coterminous with the jurisdiction conferred by the Bankruptcy Act. The court stated in *Burton Coal Co. v. Franklin Coal Co.* (8th Cir. 1933), 67 F. 2d 796, 797:

> "Some question is raised as to the equity jurisdiction of the bankruptcy court. That it is a court of equity in the sense that 'its judges and

referees, in adjudging the rights of parties entitled to their decision, are governed by the principles and rules of equity jurisprudence,' is beyond question. (Citations) It has not, however, plenary jurisdiction in equity, but is confined, in the application of the rules and principles of equity, to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act, reasonably interpreted. (Citation)

"The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence."

III.

A Court of Bankruptcy Does Not Have Summary Jurisdiction Over a Trustee's Suit for Breach of Contract.

The application filed by the trustee [R. 1-43] apparently attempts to state one cause of action, that being for breach of contract; and the sole relief prayed for is an order fixing monetary damages. The application alleges that the trustee "entered into an escrow agreement" with the bank [R. 2, lines 5-6, and R. 4, lines 24-25], that the bank closed the escrow "in violation of the written escrow instructions" [R. 2, lines 29-30, and R. 5, lines 17-18], that the escrow was closed "in direct violation of the escrow instructions" [R. 3, lines 7-8, and R. 5, lines 27-28], and that the trustee and the "estate will, therefore, be damaged by the closing of the escrow by HOLLYWOOD NATIONAL BANK in violation of the terms of the escrow instructions" [R. 4, lines 2-4, and R. 6, lines 22-24]. The

application prays for an adjudication of damages caused "by the closing of the escrow . . . in the fashion alleged herein" [R. 6, lines 31-32, and R. 7, lines 3-4]. Although there is some doubt as to whether the application adequately states a cause of action for breach of contract, at least it tries to do so. It does not attempt to state a cause of action for anything else, either in law or in equity.

The contract on which the trustee is suing, the escrow instructions, was entered into by the trustee himself after his appointment as trustee. This aspect of the case is similar to that in *Morrison v. Bay Parkway Nat. Bank* (2nd Cir. 1932), 60 F. 2d 41, *petition for cert. dismissed,* 296 U.S. 669, 57 S. Ct. 756, 89 L. Ed. 2008, in which the trustee filed petition against a bank on a contract which was made after the trustee's appointment and which involved funds of the estate. The district court ruled that summary proceedings on the trustee's petition were proper, but the Circuit Court of Appeals reversed and ordered the petition to be dismissed, holding that "a trustee cannot enforce claims for a breach of contract in a summary proceeding, but must resort to a plenary suit." *Id.* at 42.

Another relevant case involving a dispute between a bank and a trustee in bankruptcy is *In re Eiken* (2nd Cir. 1946), 154 F. 2d 717; in this case, the bank permitted the bankrupt to disburse funds out of an account after the bank knew of the bankruptcy proceeding. The trustee petitioned the referee for an order directing the bank to pay over the deposit and, at the hearing on the order to show cause, the bank challenged the summary jurisdiction of the bankruptcy court. The referee, the district court, and the Cir-

cuit Court of Appeals all agreed that "the claim of the Trustee could only be enforced in a plenary suit." *Id.* at 719. The appellate court stated as follows:

> "[A]n action to enforce a debt from the alleged debtor of the bankrupt, where the debtor denies the existence of the debt, is not within the summary jurisdiction. The Trustee, in such a case, cannot claim possession, because the existence of the chose in action is the issue in dispute." *Ibid.*

As the *Spur Fuel Oil* case points out, bankruptcy proceedings are "confined to matters in rem." *In re Spur Fuel Oil Sales Corp., supra.* It is therefore basic that an action in personam, such as one for monetary damages for breach of contract, cannot be summarily disposed of in the bankruptcy proceedings. When this basic point is ignored, a party's rights—as well as the integrity of the system—are violated.

Appellant therefore urges the application of the following concepts to the present case:

> "The exclusive jurisdiction of the bankruptcy court is limited to proceedings in bankruptcy as distinguished from ordinary suits at law or in equity. . . . Actions for merely money judgments or for other relief in personam, where the court does not attempt to recover any property transferred by the bankrupt, or its value, but merely renders judgment in personam for a debt or other obligation not arising from a transfer by the bankrupt, or orders specific performance of some contract or duty, may be instituted against a debtor, or other third party, only in the court in which the bankrupt himself, or his creditors, had there

been no bankruptcy, might have instituted them, and may not, except by consent, be instituted in the bankruptcy court." 9 Am. Jur., *Bankruptcy* §1157 (2nd ed.).

In summary, this Court's recent language in another case involving appellee as trustee in connection with summary proceedings, is very appropriate in the present case:

> "The power of a bankruptcy court to resolve adverse claims concerning the assets of the bankrupt's estate is indeed a power of imposing magnitude. Since it results in depriving adverse claimants of a plenary suit, we must ever be cautious lest we permit its extension to a situation that should not permit summary disposition. . . . When . . . the property in question is in the possession of third parties who purport to hold the property free of any claim of the bankrupt, we must carefully examine whether the expedited summary process is appropriate to the situation, This would seem particularly true in a situation, such as the present, where the property in question is a money claim against third parties rather than a physicial asset alleged to be part of the bankrupt's estate." *Suhl v. Bumb* (9th Cir. 1965), 348 F. 2d 869, 871-872, *cert denied,* 382 U.S. 938, 86 S. Ct. 388, 15 L. Ed. 2d 349.

This Court held in *Suhl v. Bumb, supra,* that appellee had to bring a plenary proceeding to avoid "abrogation of an individual's right" (*Id.* at 874). It is submitted that this is equally true in the present case.

Conclusion.

For the reasons stated, it is respectfully submitted that the referee's order denying the motion for dismissal, and the district court's order denying the petition for review and dismissal, should be reversed, and that the cause should be remanded with instructions to enter an order dismissing the Application for Order to Show Cause for Damages for Wrongful Closing of Escrow.

MANATT & PHELPS,
MILTON COPELAND,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILTON COPELAND

No. 22217

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOLLYWOOD NATIONAL BANK,

Appellant,

vs.

A. J. BUHR, TRUSTEE,

Appellee.

APPELLEE'S BRIEF.

C. E. H. McDONNELL and
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IN THE

United States Court of Appeals

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HOLLYWOOD NATIONAL BANK,

Appellant,

vs.

A. J. BUMB, TRUSTEE,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

These proceedings began when A. J. Bumb, Trustee in the Chapter XII proceedings of Louis M. Rubin, filed his "Application for Order to Show Cause for Damages for Wrongful Close of Escrow" on June 10, 1966 [R-1], in which he sought to have the Referee in Bankruptcy determine the damage to the debtor estate for the alleged wrongful closing of two escrows. All of the respondents, Hollywood National Bank, Fleming Brokerage Company and San Ysidro Ranch Corporation, appeared specially, contested jurisdiction. These motions to dismiss were overruled by the Referee on June 29, 1966, in his "Order Denying Motions to Dismiss" [R-46]. All of the respondents, including the appellant here, filed Petitions for Review [R-48]. After hearing, the District Court denied the Petitions for Re-

view and remanded the matter for further proceedings on March 23, 1967 [R-76]. The appellant here, alone, thereupon filed its Notice of Appeal [R-79].

Without contest, at and after the commencement of the debtor proceedings, the appellee, as Trustee in the Chapter XII proceedings, held title to and was in possession of two apartment complexes located in Los Angeles County and commonly known and referred to as "Sycamore Manor" and "Mountain View Manor."

The Trustee undertook to sell, pursuant to an order of Court, Sycamore Manor and Mountain View Manor. As admitted in the opening brief for appellant, to complete the sale two escrows were opened by the Trustee at the appellant Bank. The respondent Trustee contends that the escrows were closed by appellant and deeds to the respective properties delivered by appellant without authority and in violation of the escrow instructions, all to the damage of this estate in an alleged amount of $81,610.22.

Question Presented.

Although there are multiple specifications of errors on which the appellant here relies, it is submitted that they may all be summarized and considered as involving a single issue:

Is an agent of the Trustee who takes property of the bankruptcy estate from the custody of the Trustee and conveys it to a third party within the summary jurisdiction of the Bankruptcy Court?

Summary of Argument.

I.

Appellant Bank was the agent of the Trustee.

II.

Agents have a fiduciary relationship to their principals.

III.

Where property is once in the possession of a bankruptcy estate, the Court acquires jurisdiction over it.

IV.

Jurisdiction over property once in the hands of a bankruptcy estate extends to those who by their acts deprive the bankruptcy estate thereof.

ARGUMENT.

I.

Appellant Bank Was the Agent of the Trustee.

An escrow holder is the agent of the parties to the escrow and is bound to comply strictly with the escrow instructions in the State of California. *Dawson v. Bank of America,* 100 Cal. App. 2d 305, 223 P. 2d 280.

An escrow holder is a depository who is charged with the duty of obeying the instructions of the parties as to the property deposited with him, and for violation of this duty is liable in damages to the party injured. *Trask v. Garza,* 51 Cal. App. 739, 197 Pac. 807; *French v. Orange County Inv. Corp.,* 125 Cal. App. 587, 13 P. 2d 1046.

II.

Agents Have a Fiduciary Relationship to Their Principals.

In California the agent bears to his principal a fiduciary relationship, *Darrow v. Klein & Co., Inc.,* 111 Cal. App. 310, 295 Pac. 566; *Lawrence v. Tye,* 46 Cal. App. 2d 514, 116 P. 2d 180.

The duty of an agent to his principal in California is well summarized in 2 Cal. Jur. 2d §104 (pp. 771 and 772) in the following language:

> "In acting for his principal, an agent is bound to the same standards of conduct—of undivided service and loyalty—of integrity and good faith—as is a trustee; and violation of the agent's trust is subject to the same punitory consequences as are provided for a disloyal or recreant trustee. * * * a violation of duty on the part of a trustee is treated as a fraud upon the beneficiary, and a violation of duty on the part of an agent should be treated in the same manner."

III.

Where Property Is Once in the Possession of a Bankruptcy Estate, the Court Acquires Jurisdiction Over It.

Appellant admits in its brief (p. 8) the well-recognized relationship of bankruptcy jurisdiction to possession, actual or constructive, over the *res. Collier,* 14th Ed., §23.05, page 467, puts it this way:

> "The power of the bankruptcy court to proceed summarily as to controversies over property rests largely * * * upon whether or not the subject matter of the controversy is in its possession, either actually or constructively." (Citing many cases.)

In this case, there is no question whatsoever that at one time the Bankruptcy Court had full jurisdiction over Sycamore Manor and Mountain View Manor — the Trustee was operating the apartments under Court order. The Trustee eventually undertook to sell the debtor estate's interests in the two properties to Fleming Brokerage Company and San Ysidro Ranch Corporation through the appellant escrow holder.

This undenied factor of possession distinguishes the matter here from all of the cases on which the appellant seeks to rely. In every instance, they present factual situations where property was at and before the commencement of the bankruptcy proceedings in the hands of third parties and the bankruptcy estate seeks to reach that property.

Consider the situation in *In re Spur Fuel Oil Sales Corp.* (E.D.N.Y. 1962), 204 F. Supp. 696. In this case, prior to the commencement of the bankruptcy proceedings, there had been a general assignment for ben-

efit of creditors. Under that general assignment and prior to the commencement of the bankruptcy proceedings on February 19, 1962, Lawrence J. Bennett, Inc., purchased certain items of personal property and then delivered them to a third party. The trustee in bankruptcy attempted to reach the property in the hands of the third party. It will be noted that the Court specifically says at page 699 of 204 F. Supp., the Court has no jurisdiction because there was no possession of the property on the date of the commencement of bankruptcy.

Next consider the well-known case cited by appellant of *Suhl v. Bumb* (C.A. 9th, 1965), 348 F. 2d 869, cert. denied, 382 U.S. 938, 86 S. Ct. 388, 15 L. Ed. 2d 349. In this case, A. J. Bumb, as the Receiver for Security Currency Services, Ltd., sought and obtained an order from the Bankruptcy Court whereby one Suhl, his mother, Wherman, and their wholly-owned corporation, American Security Currency, Ltd., were determined to be the *alter egos* of the debtor estate and therefore all of their assets were subjected to the jurisdiction of the Bankruptcy Court and ordered to be turned over. The Court quite properly rejected jurisdiction in this instance because *there never was any possession of any of these assets at the time of the commencement of the bankruptcy or at any time thereafter.*

In *Burton Coal Co. v. Franklin Coal Co.* (C.A. 8th, 1933), 67 F. 2d 796, we have an instance where there is not even a question of property rights presented. In this instance, a surplus had developed in a bankruptcy estate and one of its creditors, who had failed to file a claim within the time then provided by the Bank-

ruptcy Act, sought to reach that surplus. This right was denied. Be it noted, that this case in 1933 was before the adoption of the Chandler Act in 1938, which generally revised the bankruptcy law pertaining to the position of creditors who had failed to file claims within the six months' period provided by the Bankruptcy Act. This case is, of course, no assistance whatsoever in the instant matter because it does not represent a situation where the Trustee is attempting to recover property from a third party.

Next consider *In re Houston Seed Co., Inc.* (N.D. Ala., 1954), 122 F. Supp. 340. In this case, the President and Secretary-Treasurer of the bankrupt filed claims to which the Trustee filed objections, asserting counterclaims for fraud, deceit, breach of fiduciary duty. The Trustee contended that by filing the claim there had been a consent to jurisdiction. The District Judge concluded that Bankruptcy Act §23 operated in Alabama, at least, so that filing a claim did not submit the claimant to the jurisdiction of the Court. This again does not present any useful fact situation for our problem here. Furthermore, the rule enunciated in 1954 in Alabama has been rejected in practically all of the circuits, including the Ninth Circuit, see *Peters v. Lines* (C.A. 9th, 1960), 275 F. 2d 919.

The factual situation in *In re Eakin* (C.A. 2nd, 1946), 154 F. 2d 717, is likewise of no assistance to us in this matter. In that case, there had been a deposit in a bank at the time of the filing of bankruptcy. The bank, assuming that the funds were trust funds, permitted the bankrupt to withdraw them. The Trustee, later on, brought a turnover order against the bank to

require the delivery of the funds. It will be noted that they were at all times either in the bank's possession or in the possession of third parties. The Court rejected the Trustee's action on the grounds that if they were trust funds, they were not part of the bankrupt estate, or if they were not trust funds, the bank had a valid setoff and, therefore, there was no possession in the estate.

Appellant also cites *Morrison v. Bay Parkway National Bank* (C.A. 2d, 1932), 60 F. 2d 41, cert. dis., 296 U.S. 669, 57 S. Ct. 756, 89 L. Ed. 2008. This is an instance of where a judgment for a preference had been obtained against one bank who had sold out to another. Without belaboring the facts further, be it noted that the assets involved were never in the possession of the Bankruptcy Court at any time and the case deals entirely with the rights of the transferee bank in the *plenary* action instituted by the bankruptcy Trustee.

The case of *Lowenstein v. Reikes* (C.A. 2d, 1931), 54 F. 2d 481, cert. den., 285 U.S. 539, 52 S. Ct. 311, 76 L. Ed. 932, is of little assistance to us here. This is a voidable preference action where a question was presented as to whether or not a notice of appeal was timely: It would have been timely if these were plenary actions; it would not have been timely if they were summary bankruptcy proceedings. Be it noted that the property was never in the possession of the Bankruptcy Court.

Finally consider *Bardes v. First National Bank of Hawarden* (1900), 178 U.S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. This is an action by Bardes, as the Trustee, to set aside a voidable preference. The case clearly

enunciates that which is the general rule, namely, that Bankruptcy Act §2a(7) incorporates, at least to an extent, and is governed by Bankruptcy Act §23.

IV.

Jurisdiction Over Property Once in the Hands of a Bankruptcy Estate Extends to Those Who by Their Acts Deprive the Bankruptcy Estate Thereof.

Sycamore Manor and Mountain View Manor were in the possession of the Bankruptcy Court. The ability to convey those properties was placed in the hands of appellant, an agent of the Trustee. The appellant wrongfully allowed third parties to obtain title and possession of Sycamore Manor and Mountain View Manor. Appellant now comes to this Court and insists that despite its agency relationship, despite having breached its duty to the Trustee, the loss of possession occasioned by its act deprived the Bankruptcy Court of jurisdiction. Appellee insists that both by reason and the law this is not the case.

The general rule has been set forth in *Collier,* 14th Ed., §23.05, pages 480 and 481:

> "It has been said that 'Constructive possession occurs where the property (1) is in the physical possession of the bankrupt at the time of the filing of the petition but is not delivered by him to the receiver or trustee, or (2) *is delivered to the receiver or the trustee but is thereafter wrongfully withdrawn from his custody,* or (3) is in the hands of the bankrupt's bailee or agent, or (4) is held by some other person who makes no claim to it, or (5) is held by one who makes a claim which is not substantial and is colorable only.'" (Emphasis supplied.)

The District Court of New York in *Matter of Retail Stores Delivery Corp.,* 5 F. Supp. 892, summarizes the pertinent rule in the following language:

> "It is also the established rule that jurisdiction once attaching is not lost by the fact that later on possession of the property passes to strangers without order of the court and while the bankruptcy proceeding is still active. It is immaterial whether the change of possession has come about through voluntary transfer by the bankrupt or his agent, seizure by officers of state courts, or unauthorized surrender by officers of the bankruptcy court; the jurisdiction continues and the court has summary power to order a return of the property. * * * Where property once in the custody of the bankruptcy court is removed, return of the property may be summarily ordered without a trial of title; that issue may be tried later when and if the alleged owner seeks to reclaim."

The earliest case that appellee has been able to discover on this matter is *White v. Schlorb,* 178 U.S. 542, 20 S. Ct. 1007, 44 L. Ed. 1183. In this case, on September 13, 1899, a voluntary petition in bankruptcy was filed. On the same day the Referee ordered the store locked to protect its contents. On September 21, 1899, the Cogans began an action in the Wisconsin State Court to replevy certain of the personal property which was locked in the store. In this action the Sheriff broke into the store and took possession before the Trustee could be elected. Upon his election, the Trustee instituted a petition for an order to show cause to require the return of the property from the Sheriff, who then made a motion to dismiss on the grounds of no jurisdiction

because the property was not any longer in possession of the Bankruptcy Court and was held under an adverse claim. The Supreme Court determined that once the property was in the custody of the Bankruptcy Court, it could not be taken therefrom upon process in the State Court without the authority of the bankruptcy Judge. The Court then, at page 548 of 178 U.S., said as follows:

> "* * * the judge of the court of bankruptcy was authorized to compel persons who had forcibly and unlawfully seized and taken out of judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; * * *."

From these cases, it will be seen that there is a clear right to recover property which has been taken from the possession of the Bankruptcy Court: But what of the situation where the property cannot be returned?

The leading case in this area appears to be *Burnham v. Todd* (C.A. 5th, 1943), 139 F. 2d 338. In this case, a bankruptcy Trustee, after many years of administering certain oil leases under the jurisdiction of the Bankruptcy Court, discovered that Burnham and Johnston had removed from under the oil leases approximately 55,000 barrels of oil of a value of about $1.15 per barrel. He instituted a summary proceeding in the Bankruptcy Court against Burnham and Johnston to require them to pay this amount to the bankruptcy estate. Burnham and Johnston contended that the action would not lie against them because they were entitled to a plenary suit. In dealing with this problem the Court said, at page 341 of 139 F. 2d the following:

> "The prayer is for a summary restoration of the value of the oil. It is common knowledge, and the

> evident assumption of the petition, that oil at the wells is soon mingled with other oil and disposed of, so that identification and restoration of the oil itself would after the lapse of years be impossible. When property taken from the custody of the court is put beyond the possibility of return, the taker can be required to make reparation by paying its value instead. [Citing cases] The object of such a proceeding is not to try the title to the property, or to adjudicate any interest in it, but to maintain the integrity of the court's custody and its right to administer it. * * * The oil here was in the actual custody of the court, and Johnston and Burnham make no claim of right to it; they only say they did not take it. If they now had it, without question they might be required summarily to turn it over. Since they have done away with it, with equal certainty they may be required to substitute it with money."

It is submitted that this case is, at least in theory, almost precisely on all fours with the instant problem. An inspection of the Trustee's Application will reveal that the following is the generally contended situation: That the parcels of property involved were subject to an institutional first deed of trust and taxes; that the terms of the sale called for the first deed of trust to be made current and taxes paid; that the escrow was closed by appellant without the performance of this consideration and that therefore the properties were available to be foreclosed by the institutional lender. In California, it now appears to be the rule that where a bona fide purchaser obtains the property which was improperly delivered by the escrow holder, that the

original owner may not recover the property, see *Phelps v. American Mortgage Co.,* 40 Cal. App. 2d 361, 104 P. 2d 880. Thus it would appear, that the actions of the respondents in the order to show cause proceeding have placed Sycamore Manor and Mountain View Manor beyond the reach of the Trustee in the debtor proceedings. Therefore, applying the rule of the *Burnham* case, it would appear that there was clearly jurisdiction in the Bankruptcy Court to require appellant, and also the buyers, Fleming Brokerage Company and San Ysidro Ranch Corporation, to respond in damages to the Court.

A similar result is reached in the case of *In re Mason C. Jones Co.* (N.D. Ohio E.D., 1953), 109 F. Supp. 843. In this case, the Trustee took possession of certain premises of the bankrupt and changed the locks. One Arment broke into the premises and took out chattels which he claimed to belong to him. The Referee found summary jurisdiction to require the payment of the value of the chattels, saying at page 847 of 109 F. Supp., the following:

> "* * * the petitioner's careless disregard of the authority and possession of the bankruptcy court, coupled with his failure to account for assets on the premises and those which he admitted he removed places upon him the responsibility of producing such property *or its approximate value.*" (Emphasis supplied.)

There is no point in belaboring the matter further: The cases and the authorities seem to be in complete accord that where, as here, property has been in the possession of a bankruptcy estate and has been, by some third party, removed from that possession, the

Bankruptcy Court has jurisdiction to either compel its return or, if that proves to be impossible, to fix a monetary sum of damages for the property which has thus been lost. Certainly, this general rule should be even more reinforced where, as here, the person who removed the property from the possession and control of the Bankruptcy Court is an agent bearing a fiduciary duty to the bankruptcy Trustee.

Conclusion.

The Referee's Order sustaining his jurisdiction was in all respects proper, and the Order of the District Court denying the Petition for Review and remanding for further hearing should be sustained and the matter should be remanded to the Referee for trial upon the merits.

Respectfully submitted,

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By C. E. H. McDonnell,
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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. E. H. McDonnell

No. 22217

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOLLYWOOD NATIONAL BANK,

Appellant,

vs.

A. J. BUMB,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Question Presented.

It is not sufficient to state the issue presented by this case merely in terms of whether the bankruptcy court has summary jurisdiction over the parties (as appellee's brief does, expressly on page 2 and impliedly throughout the brief). The question is, summary jurisdiction for what purpose? *i.e.,* summary jurisdiction over what controversies between the trustee and appellant? It is true that, as escrow holder, appellant was an agent of the selling trustee and of the buyer to carry out their instructions, and bore a fiduciary relationship to each of them. The issue is whether the trustee can invoke the summary jurisdiction of the bankruptcy court to get a money judgment for damages allegedly resulting from a breach of the escrow instructions by the escrow holder.

The question is whether such a suit is strictly or properly part of the proceedings in bankruptcy.

Moreover, the issue is presented in its starkest form inasmuch as the trustee initiated summary proceedings for damages for $81,610.22 without attempting to recover the real property conveyed to the buyers. The buyers (Fleming Brokerage Company and San Ysidro Ranch Corporation) still owned the property at the time the summary proceedings were initiated, and they are parties from which the trustee is seeking damages; nevertheless, the application [R. 1-43] and the order to show cause [R. 44-45] are silent as to recovery of the property.

The Basic Fallacy of Appellee's Argument.

It is respectfully submitted that there is a tremendous difference between "jurisdiction over property" and jurisdiction over a controversy concerning whether damages resulted from the close of an escrow involving property. If a trustee attempts to recover property or the value of property once in his possession, there is a controversy "over property". However, in the present case, the trustee has chosen not to challenge the right of the buyers to keep the property; instead, the trustee is looking to appellant, as the escrow holder which allegedly closed the escrow improperly, to pay $81,610.22 in damages. The *in rem* jurisdiction of the bankruptcy court simply is not appropriate for the trustee's controversies with appellant, controversies as to whether appellant breached its contract as stated in the escrow instructions and as to whether damages resulted even if there was a breach.

These controversies are not "controversies over property" as that phrase is used in the quotation from Section 23.05 of *Collier* on page 5 of appellee's brief. What does *Collier* mean by "controversies over property"? Section 23.05 quotes (at pp. 478-479) from *Shea v. Lewis* (8th Cir. 1913), 206 Fed. 877, as follows:

> "The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of *controversies* between the trustee and such claimants *over liens upon and title to property claimed by the trustee* as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt. When those in possession are not adverse claimants, but are only representatives of the bankrupt without claim of lien upon, or right to, the property in themselves, the bankruptcy court may by summary proceeding take the actual possession of the property and then, when it has thus acquired the actual possession, may by summary proceedings determine *the validity of claims or liens upon and titles to it.*" (Emphasis added.)

In the present case appellant and appellee agree that the bankruptcy court has summary jurisdiction over the real property, it having been in the actual possession of trustee; but the fact remains that the trustee does not invoke the referee's jurisdiction over the property by raising any issue involving "possession of the property" or "the validity of claims or liens upon and title to it" (*ibid.*).

In *McEldowney v. Card* (E.D. Tenn. 1911), 193 Fed. 475, writ of error dis., 213 Fed. 1020, the trustee in bankruptcy chose to sue defendant "in trover to recover the value of property that had belonged to the bankrupt estate and had been converted by the defendant to his own use after title to the property had been vested in the trustee by virtue of the adjudication in bankruptcy." The court had to decide if the suit was "a controversy with an adverse claimant of the bankrupt's property", and ruled that it was not such a controversy because "the present suit involves no controversy as to the right or title of the trustee to the logs which passed to him as part of the bankrupt estate." (*Id.* at 481.)

Discussion of Cases Cited in Appellee's Brief.

For convenience, the cases cited in appellee's brief are discussed here in the same chronological order in which they appear in appellee's brief. Since appellant does not think that the present case involves the use of the bankruptcy court's jurisdiction over property, the cases cited in appellant's opening brief were not chosen on the basis of who had possession of the property at the commencement of the bankruptcy proceedings. For example, contrary to appellee's statement (p. 5 of his brief) that "i[n] every instance" these cases concern property in the hands of third parties at the commencement of the bankruptcy proceedings, *In re Spur Fuel Oil Sales Corp.* (E.D. N.Y. 1962), 204 F. Supp. 696, is a case in which the court held that the debtor's agent, the assignee for the benefit of creditors, was in constructive possession of the property at the time of the filing of the bankruptcy petition.

In re Spur Fuel Oil Sales Corp., supra, was cited in appellant's opening brief (pp. 8 and 14) in support of the general proposition that the bankruptcy court's summary jurisdiction is confined to matters *in rem.* As a matter of fact, contrary to the statement on page 6 of appellee's brief, the *Spur Fuel Oil* court held that the bankruptcy court did have summary jurisdiction in that case because of the constructive possession of the debtor's agent.

Appellant's opening brief does not state or imply that *Suhl v. Bumb* (9th Cir. 1965), 348 F. 2d 869, cert. denied, 382 U.S. 938, 86 S. Ct. 388, 15 L. Ed. 2d 349, presented the same precise issue as that of the present case. Rather, appellant suggested that certain language of the *Suhl* opinion (quoted on page 15 of appellant's opening brief) was appropriate in a consideration of the present case; appellant stands by that suggestion. It is "particularly true" that the courts "must carefully examine whether the expedited summary process is appropriate" in a situation "where the property in question is a money claim against third parties rather than a physical asset alleged to be part of the bankrupt's estate." (*Id.* at 872.)

Ignoring the reason why appellant cited the case, page 7 of appellee's brief states that *Burton Coal Co. v. Franklin Coal Co.* (8th Cir. 1933), 67 F. 2d 796, "does not represent a situation where the trustee is attempting to recover property from a third party." This is true; it is likewise true that the present case does not represent such a situation. Moreover, if the trustee should attempt to recover the property, such an attempt would not involve appellant, who does not and never has owned or possessed the property.

The case of *In re Houston Seed Co.* (N.D. Ala. 1954), 122 F. Supp. 340, correctly states the limiting effect of Section 23 of the Bankruptcy Act; and this is the reason that the case was cited on pages 10 and 11 of appellant's opening brief. The consideration of when a claim constitutes consent is irrelevant in the present case, but it is very relevant that a party's consent must be given before the bankruptcy court can adjudicate a controversy not strictly part of the bankruptcy proceedings. Actually, the Ninth Circuit case cited by appellee (*Peters v. Lines* [9th Cir. 1960]. 275 F. 2d 919), does not reject the holding of the *Houston Seed* case regarding a claim's effect on consent; the *Peters* court specifically limited its holding to a trustee's petition for affirmative relief arising out of the same transaction as the proof of claim. (*Id.* at 925-926.) The Court pointed out that this is "quite a different matter from holding that submission of a claim is a consent to summary jurisdiction on a counterclaim arising from an entirely separate transaction." (*Id.* at 925.)

The discussion of *In re Eakin* (2nd Cir. 1946), 154 F. 2d 717, on pages 7 and 8 of appellee's brief misses the point. As the discussion recognizes, at the time of filing of the petition the funds were in the possession of the bankrupt's bank, and were thereafter withdrawn by the bankrupt. The bank's defenses (that the funds were trust funds and, alternatively, that the bank had a right to offset) did not affect the question of possession, and the mere existence of these issues could not defeat the summary jurisdiction of the court. If the contents of a safe deposit box had been involved, disputes over the ultimate ownership of the property would not have changed the fact that the property was in the bankrupt's possession.

The significant factor in the *Eakin* case—and in the present case—is that the trustee's action against the bank was not to recover possession of property, but was "an action to enforce a debt . . . where the debtor denies the existence of the debt" (*Id.* at 719). The Court said that such an action "is not within the summary jurisdiction," and "[t]he Trustee, in such a case, cannot claim possession, because the existence of the chose in action is the issue in dispute." (*Ibid.*)

Although the facts are considerably different, the same basic distinction between the recovery of property and the enforcement of a money claim is involved in *Morrison v. Bay Parkway National Bank* (2nd Cir. 1932), 60 F. 2d 41, pet. cert. dis., 296 U.S. 669, 57 S. Ct. 756, 89 L. Ed. 2008. After the trustee had recovered a money judgment against Bay Parkway National Bank (based on the setting aside of a preference), Lafayette Bank purchased all of the assets of Bay Parkway National Bank. The trustee then petitioned for a summary order directing Lafayette Bank to pay the judgment. Although the trustee argued that Lafayette Bank had assumed the obligation owed directly to the trustee, the Court applied the general rule that "a trustee cannot enforce claims for a breach of contract in a summary proceeding, but must resort to a plenary suit." (*Id.* at 42.) (Appellee's assertion that the action against the transferee bank was *plenary* (p. 8 of appellee's brief), is simply not understandable in light of the reported opinion; the first paragraph reads, "The question before us is whether the judgment to recover an unlawful preference which the trustee in bankruptcy obtained against the Bay Parkway National Bank can be enforced in a *summary* proceed-

ing against Lafayette Bank, the transferee of the former bank's assets." *Ibid.;* emphasis added.)

It is submitted that the cases of *Lowenstein v. Reikes* (2nd Cir. 1931), 54 F. 2d 481, cert. denied, 285 U.S. 539, 52 S. Ct. 311, 76 L. Ed. 932, and *Bardes v. First National Bank of Hawarden,* 178 U.S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175, support the propositions for which they were cited in appellant's opening brief (pp. 8, 9-10).

Appellee's quotation (p. 10 of his brief) from *In re Retail Stores Delivery Corporation* (S.D.N.Y. 1933), 5 F. Supp. 892, supports the use of summary jurisdiction for "return of the property", and nothing more. Likewise, the case of *White v. Schlorb,* 178 U.S. 542, 20 S. Ct. 1007, 44 L. Ed. 1183, is limited to the question of the power of the bankruptcy court to compel restoration of property once in its custody. The Supreme Court indicated that its ruling was "not going beyond what the decision of the case before us requires," and that "the questions certified concern, not the trial of the title to these goods, but only the judicial custody and lawful possession of them." (*Id.* at 178 U.S. 547-548, 546.)

The case of *Burnham v. Todd* (5th Cir. 1943), 139 F. 2d 338, deserves special attention here inasmuch as appellee submits that it is "the leading case in this area" and "at least in theory, almost precisely on all fours with the instant problem" (pp. 11 and 12 of appellee's brief). The *Burnham* court emphasized that

the summary proceeding in that case was not an action for conversion of the property in question. The following quotations are instructive:

> "Although the mention in the petition of the highest value of the oil as the measure of the reparation due smacks of damages for conversion, the petition as a whole is evidently a summary one for the restoration to the court's administrator of property wrongfully taken from its custody. The petition makes no allegation as to the title to the oil, but alleges only that it was from an oil lease which was in the custody of the bankruptcy court and which the petitioner was operating under the court's orders. The prayer is for a summary restoration of the value of the oil." (*Id.* at 341.)
>
> "This not being a suit at law for damages for a conversion of property, there was no right to a jury trial." (*Id.* at 342.)
>
> "The two-year statute, Vernon's Texas Civil Statutes, Art. 5526, applying to 'Actions for detaining the personal property of another, and for converting such property to one's own use' and 'Actions for taking or carrying away the goods and chattels of another', does not control, for this is not an 'action'; and is not based on title and does not seek damages, as has been before pointed out." (*Id.* at 43.)
>
> "As tort-feasors all participants would be jointly and severally liable for the whole damages; but this is not a tort suit, it is an effort to trace assets wrongly taken from the custody of the court and compel their return. We believe each participant is

answerable in equity only for the benefit he got." (*Id.* at 344.)

A consideration of these quotations from *Burnham v. Todd* reveals significant differences between that case and the present case, including the following:

1. The present petition is not "a summary one for the restoration to the court's administrator of property wrongfully taken from its custody."

2. The present prayer is not "for a summary restoration of the value of the" property. Furthermore, the trustee's equity in the property apparently had no value inasmuch as the trustee had recommended, and the bankruptcy court had authorized and directed, that the sale be consummated without net benefit to the estate. [R. 9-15, 27-33.]

3. The present case involves "a suit at law for damages," for which there is the "right to a jury trial."

4. The present action does seek damages, and the California statute of limitation applies.

5. The present suit is not "an effort to trace assets wrongly taken from the custody of the court and compel their return."

6. In the *Burnham* case, "each participant (was) answerable in equity only for the benefit he got" from the property. Whereas Johnston and Burnham took the property and sold it for their own benefit, appellant in the present case handled the escrow for the benefit of the parties to the escrow and received nothing from the property.

A consideration of the quotation from *Burnham v. Todd* on pages 11 and 12 of appellee's brief reveals the following additional significant differences between that case and the present case:

1. The present action's purpose is not to require appellant "to substitute" the property "with money"; the trustee sold the property in the first place without intending to get any money for it. Furthermore, the *Burnham* court first pointed out that "if they (Johnston and Burnham) now had it (the property), without question they might be required summarily to turn it over", before concluding, "Since they have done away with it, with equal certainty they may be required to substitute it with money." In the present case, appellant was nothing more than an escrow holder and never had title or possession of the property.

2. Identification and restoration of the property itself is not impossible in the present case, as it was in *Burnham.* Page 12 of appellee's brief bears out what is obvious from paragraph XII of the trustee's application [R. 3, 6], that the properties were owned by the original buyers and had not been foreclosed but were "available to be foreclosed by the institutional lender." The application itself destroys any notion that the buyers were bona fide purchasers, since (1) they were party to the escrow and knew its terms and (2) paragraph XI alleges that they authorized appellant to close the escrow in the allegedly wrongful manner [R. 3, 5.].

Furthermore, even if the property had been obtained by a bona fide purchaser, appellee's brief

incorrectly states California law on the subject of whether the original owner could recover the property. The case cited by appellee (*Phelps v. American Mortgage Company* (1940), 40 Cal. App. 2d 361, 104 P. 2d 880) admits that there is a distinction "between entrusting a depository with a document totally invalid until delivered, and entrusting him with the indicia of ownership to a valid instrument representing a valid existing obligation." Whereas the *Phelps* case dealt with promissory notes that were live, complete, operative instrument(s) representing an existing and binding obligation", the court contrasted that situation to a fact situation like that of the present case: "The . . . basis of the so-called escrow rule . . . is that the documents that were . . . delivered to the escrow holder to be delivered upon performance of certain conditions, were not binding obligations or deeds until delivered by the escrow holder upon performance of the conditions. When the escrow holder delivered them to the third party without performance of the conditions, he was delivering documents that never had represented binding obligations and never became binding, even as to *bona fide* purchasers, because of lack of a proper delivery." (*Id.* at 885.)

The *Phelps* court assumed, without deciding, that this "escrow rule" was in effect in California; other California courts have applied the rule. The California Supreme Court ruled in *Promis v. Duke* (1929), 208 Cal. 420, 281 P. 613, 615, that the transferee M. E. Duke "took nothing under the deed purporting to transfer and convey the same

to her," and, "even if she were to be regarded as a *bona fide* purchaser for value, it would avail her nothing". (See also, *Los Angeles City High School District v. Quinn* (1925), 195 Cal. 377, 234 Pac. 313.) In the more recent case of *Todd v. Vestermark* (1956), 145 Cal. App. 2d 374, 302 P. 2d 347, 349, California law was expressed as follows: "[A] delivery or recordation by or on behalf of the escrow holder prior to full performance of the terms of the escrow is a nullity. No title passes. (Citations)"

In re Mason C. Jones Company (N.D. Ohio E.D. 1953), 109 F. Supp. 843, is also a case in which a party wrongfully taking property from the custody of the bankruptcy court was ordered to return the property or its approximate value. The referee's certificate indicated that the proceeding was a turnover proceeding, and the referee concluded that "[t]he Court has summary jurisdiction to compel turnover of the property which was once in its possession." (*Id.* at 845.) It was therefore consistent with such a proceeding that the petitioner was ordered to produce "the property *or its approximate value,*" but it is surprising that appellee in the present case would emphasize this language since it is not at all like the adjudication which he desires from the bankruptcy court.

Conclusion.

Appellee's brief goes no further, and cites no cases that go further, than to suggest that summary jurisdiction is available to recover property wrongfully taken from the bankruptcy court and, if return of the property is impossible, to require the party who makes such return impossible to restore to the estate the value of the property. And yet, if this is conceded to be the law, these are not the purposes for which the trustee in the present case invoked the referee's jurisdiction.

It is respectfully submitted that the referee's order denying the motion for dismissal, and the district court's order denying the petition for review and dismissal, should be reversed, and that the cause should be remanded with instructions to enter an order dismissing the Application for Order to Show Cause for Damages for Wrongful Closing of Escrow.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILTON COPELAND